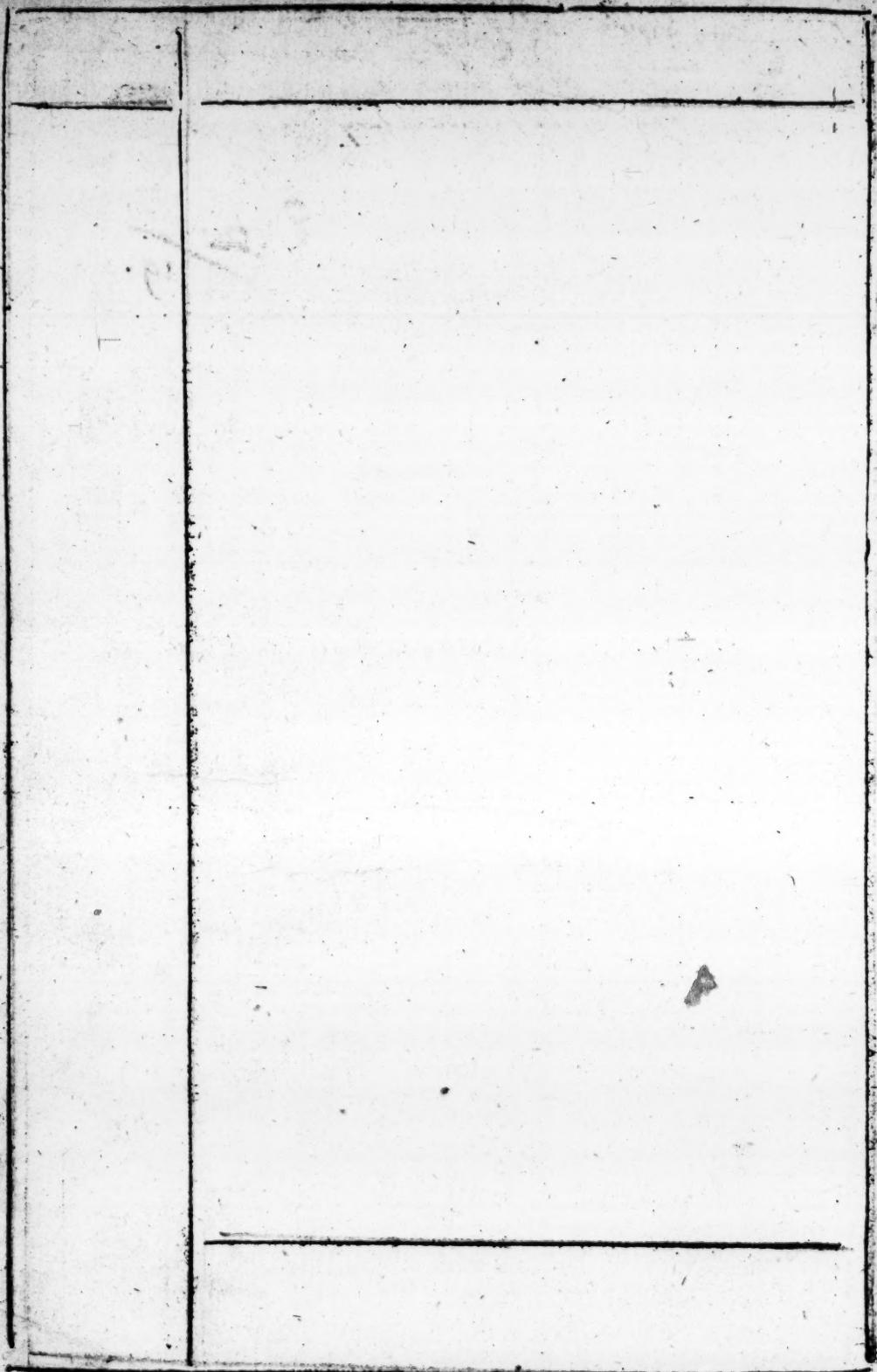


See the Case of the Post-mistress, and L. Chancellor
Gordon's Speech & published in Hargrave's New
Edition of the State Trials.







H. Geston S.

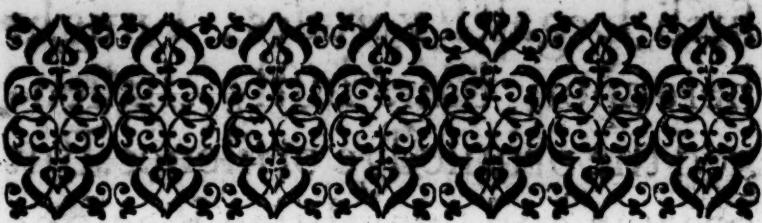
THE SPEECH
OF THE LORD
CHANCELLOR OF
England, in the Eschequer
Chamber, touching the
Post-nati.



LONDON,
Printed for the Societie of
Stationers. An. 1609.

*The Printer to the curteous
Reader.*

THrough great haste (the common Spoiler of most serious Labours, Hillary Terme being halfe spent ere this Booke could come forth) the word *Non*, in the 45. page, and 15. line, of all the Bookes of the first Impression was left out, which altered the Sentence to a cleane contrary Sence: Therefore, in those first imprinted Bookes, for *Quod lego, non credo*, reade *quod non lego, non credo*, according to the correction of that place in these Bookes of the second Impression.



To the louing Readers.



Efore I pre-
sumed to speake
in the Esche-
quer Chamber
in R. C. Case
(which is now
commonly called, the Case of
Post-nati,) I considered mine
age and infirmities, and how
long I had discontinued from

To the Readers.

such Legall Exercises. I might hereupon haue iustly challenged the priuiledge of silence: But greater and weightier Reasons ouer ruled mee , and enforced mee to waiue the benefit of that priuiledge: For, looking into the nature of the Question then in hand , and examining the Circumstaunces , I found the Case to bee rare , and the Matter of great import and consequence, as being a speciall and principall part of the blessed and happy Vnion of great Britaine.

I heard many learned and iudicious Arguments , made by the reuerend Judges : and finding that they did not all con-

To the Readers.

curre in Opinion (though the number was indeede so few, of them thare differed, that in *Greeke* it woulde not make a plurall number) and that some things were by them omitted, which seemed to mee to be both pertinent to the Matter, and necessary to bee knowne, and more proper and fit to bee spoken by me, respecting the place I hould, than by them, that did wholy binde themselues to the forme and rule of legall Argument and Discourse : I thought that I coulde not, in duetie, sit as a dumbe and idle Hearer onelie: The Cause being iudicialy depending in the high Court of

consol.

Chan-

To the Readers.

Chancerie, where I was to iudge
of it according to Lawe, following
the rule of mine owne Con-
science, and the measure of mine
owne vnderstanding, and not
to bee swayed vwith the vveight
of other mens opinions.

I considered also, that althogh
Silentij tutum præmium is often
true in humane policie, yet
sometime, there is *Crimen Re-
ticentia*; and therefore the Pro-
phet said, *Væ mibi quia tacui*. And
Chrysostome obserueth, that, *Tri-
bus modis in veritatem peccatur*: 1.
Veritatem praetimore tacendo: 2.
*Veritatem in mendacium Commu-
tando*: 3. *Veritatem non defenden-
do*. Remembryng this, my Con-

science

To the Readers.

science tould me, that howsoeuer Silence might in this Case haue excused mee of the second, yet I could not haue escaped by Silence, from offending in the first & last. And if *Festus* thought it not reason, to send a prisoner, without shewing the Causes which were layed against him, I might haue beene worthily & iustly censured, if vpon other mens arguments, and as it vvere *fide implicita*, I should haue pronounced my iudgement and sentence in so great a Cause, vvithout declaring the grounds and reasons vvhereupon I stood. Thus, Duetie and Necessitie (for, *ratio sapienti necessitas*) were

onel

the

To the Readers.

the causes that induced mee to speake in this rare and weightie cause, and the force of truth moued mee to speake that which I did speake, without respect of pleasing or displeasing any. And so, hauing the warrant of a sincere conscience, which is truly said to be, *veluti Comes, & Testis, & Index actionum*, I haue in the Chancerie iudged and decreed the Case for R. C. And the like Judgement is also giuen by the Judges of the Kings Bench, in the Assise depending in that Court. The decree and iudgement being thus passed, diuerse vnperfect Reports, and seuerall patches and pieces of my Speech

old

haue

To the Readers.

haue bin put in writing, & disper-
sed into many hands , and some
offred to the Presse . The Kings
M^{ie}. hauing knowledge there-
of, misliked it, & thereupon cō-
manded me to deliuier to him in
writing, the whole discourse of
that which I said in that Cause.

Thus I was put to an vnexpe-
cted new labour , to reuiew my
scribled & broke papers. Out of
which (according to the charge
imposed vpon me) I gathered all
which I had before spoken, & so
set it downe faithfully & plainly,
and (as neare as I could) in the
same words I vttered it:it pleased
his sacred M^{ie}. to take some view
of it, & taking occasion thereby,

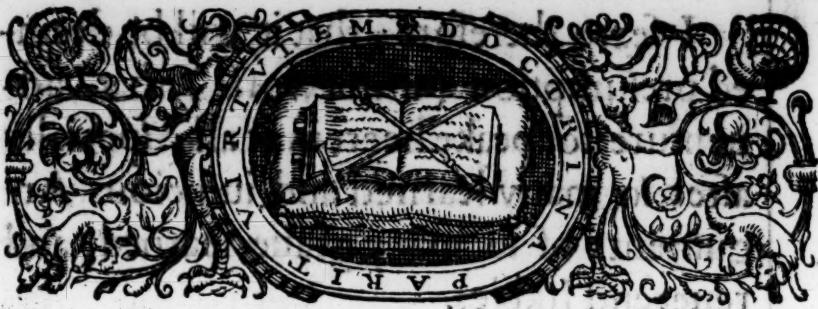
to

To the Readers.

to remember the diligence of the
L. chiefe Iustice of the common
place, for the summary report he
had published of the Judges Ar-
guments, he gaue mee in charge
to cause this to be likevvise put in
Print, to preuent the Printing of
such mistaken and vnperfect
reports of it, as vvere alreadie
scattered abroad.

Whatsoeuer it is, it vvas first
conceiuē & spokē out of con-
science & duty; and is now pub-
lished in humble obedience to
my most gracious Soueraigne.
And so I offer and commend it
to your good acceptance and fa-
uourable interpretation.

T. Ellefsmere Canc.



beint escess dudicidemt pldvnt off
panellm. blaklyt sckb. on flur
or son.  Post-nati.
-mug odior blaklyt sckb. on flur
and bonted uppon m. tot : 969

M Y Lords, mine age,
mine infirmitie, and indisposition of health,
my decaie and weake-
nesse of memorie, and
Desuetudo, and long dis-
continuance from this maner of Legall ex-
ercise (aboue fourteene yeeres) haue be-
reauied mee of the meanes and helpe that
should inhable me to speake in so greate
Case.

I feare therefore , that it will be deemed presumption (if not worse) that I aduenture to speake heerein at all ; specially after so many learned and iudicious Arguments of so many graue, learned, and reuerend Judges.

To say the same that hath beene saied, must needs be vnpleasaunt , wearisome, and loathsome to the hearers ; and not to say the same , is to speake little to the purpose : for , what more can bee saied than hath beene ?

Yet , for that the Case is depending in *Chancerie*, and adiourned hither for difficultie in Law, & there I must giue iudgement according to the Law, Whether the Complainant bee inhabbled , by Lawe , to maintaine his suit in that Court, or not : I holde it more fitting to deliuier the reasons of my iudgement heere , where others haue beene heard, than there , before a few , which haue not heard that which hath beene so learnedly argued, and largely debated heere.

And

And therefore the Case standing thus,
I will speake what I thinke : And I must
say as one of the graue Judges saied, I can
tell no newes ; But some old things which
I haue read and obserued, I will remem-
ber ; but I can not diuine, or prophesie
de futuris, I leauue that as Iustice Yelverton
did.

I am free, and at libertie *Nullius addictus*
iurare in verba Magistri, and therefore I
will speake ingenuously and freely.

In the arguing of this Case, some things
which are of great weight with mee , haue
(in mine opinion) beeene passed ouer too
lightly ; and some other thinges which
seeme to me but light, haue beeene ouer-
weighed, as I thinke.

Halfe an howers time longer or shorter
I meane not to striue for , and therefore I
will presume on your patience, and assume
to my selfe such conuenient time as o-
thers haue done : And yet I will husband
time as well as I can.

I will not be abashed to strengthen my

weake memory with helpe of some scrib-
led papers, as others haue done : for I ac-
compt it a point of wisedome to followe
wise mens Examples.

Other Exordium, Insinuation, Protesta-
tion, or Preface for the Matter it selfe ; ei-
ther to prepare attentive and benevolent
auditors, or to stirre offence or mislike a-
gainst either partie, I meane not to vse ; it
is fit for Oratours, I neuer professed the
Art, I had never skill in it : And it is not
Decorum for Judges, that ought to respect
the Matter, and not the humours of the
Hearers.

The Exordium the Ciuilians vse in their
Sentences I like well ; *In Dei nomine Amen,*
& Deo primitus inuocato ; other Exordium I
care not for.

The Case.

The Case now depending in Chauncerie
which is adiourned hither, is thus.

Robert Caluine, sonne and heire apparent
of James L Caluine of Colcrosse in the realme

of Scotland, an Infant of three yeares of age, borne in the saied Realme of Scotland, maketh title by his Bill to a Messuage and Garden with th' appurtenances in the parish of Saint Buttolph without Bishoppes-gate in the citie of London: and complaineth against *John Bingley*, and *Richard Griffin*, for detaining the Evidences concerning the same Messuage and Lands, and taking the profits thereof.

The Defendants pleade, that the Plaintiff is an *Alien*, and that in the third yeere of his Maiesties raigne of *England*, and in the nine and thirtieth yere of his Maiesties raigne of *Scotland*, hee was borne in the Realme of *Scotland*, within the lieeance of his said Maiestie, of his Realme of *Scotland*, and out of the lieeance of our soueraigne Lord the King of his Realme of *England*.

And the Defendants say further, That at the timel of the birth of the Complainant, and long before, and ever since, the saied Kingdome of *Scotland* was, and still is, ruled and gouerned by the proper

Lawes and Statutes of the said Kingdome of Scotland, and not by the Lawes and Statutes of this Realme of England: And therefore the Defendants demaund iudgement, Whether the Complainant ought to bee answered to his said Bill, or shall be received to prosecute the said suite against the Defendants, being for, and concerning the title of Inheritance, and euidence touching the same.

Heereupon the Complainant hath demurred in Law.

This is the speciall Case now depending in the Chancerie; in which, and touching all like Cases in generall, mine opinion is, and since the question was first moqued hath beene, That these Post-nati are not Aliens to the King, nor to his Kingdome of England, but by their Birth-right, are likewise subjects to the King, and capable of estates of Inheritance, and freehold of Landes in England: and may have and

maintaine as wel Reall as Personall actions
for the same. And that therefore the now
Complainant Robert Calvine ought to bee
answered.

This opinion I did first conceiue vpon
those rules and reasons in Lawe(as wel) the
Common Law of *England*,as the *Civile law*)
which heereafter in the course of my
Speech I will remember. And in this op-
pinion I haue beene since confirmed by
many great and weighty reasons.

First , in the Statute made in the first
yeare of his Maiesties raigne of *England*,
authorizing the Treatie betweene the
Commissioners for both the Kingdomes,
it is said (as Iustice Warburton noted well)
That both the famous & ancient Realmes
of *England* and *Scotland*, are now vnited
in allegiance and loyall subiection in his
royall person, to his Maiestie, and his po-
sterite for ever.

Heere wee haue the Judgement of the
Parliament, that there is a Vnitie in alleg-
iance

The proce-
ding in the ge-
nerall Case of
Post-natio
Stat. 3. Iac.
19. Mart. 1603

&

Rest-nati.

The Procla-
mation,
a. Iacobii 20.
Octobr. 1604.

1604
20 Octobr
1604
a. Iacobii
20 Octobr
1604

ance to one Royall person ; And therefore I see not how wee may out of imaginarie conceipts, so and by subtle distinctions straine our wittes to frame severall allegances to one and the same Royall person, contrary to so plaine a declaration made by Parliament. *Etiamen tibi haec soluta loqua*
(misericordia vestra domini nominis)
ym Next followeth his Maiesties Proclama-
tion id est Octobris 1604. by which hee
assumed to himselfe the Name and Stile of
King of great Britaine. In which Proclama-
tion, among many other weighty reasons,
this is added for one, *We haue received from*
those that be skilful in the Lawes of the Land,
That immediatly upon our succession, diverse of
our ancient Lawes of this Realme are ipso
facto expired, as namely, that of Escuage,
and of the naturalization of the Subjects. This
was not done sodainely, nor lightly ; but
upon grave and serious deliberation, and
aduise : And therefore seemeth to mee to
be a matter of great importaunce, and not
to be lightly regarded.

The same twentieth of October, these Commissioners beganne their Treatie. Of the graue and iudicious Course which they held, in debating of the Matter then propounded, I will forbear to speake: But for this point of Naturalization now in question, their resolution in the end was thus:

That it shall bee propounded to both the Parliaments at the next Sessions, that an A^ct be made containing a declaration, as followeth: That all the Subiects of both the Realmes, borne since the decease of Elizabeth the late Qu. of *England* of happy memory, and all that shalbe borne hereafter vnder the obedience of his Maiestie, and his royall Progeny, are by the common Lawes of both the Realmes, and shall be for euer, inhablled to obtaine, succeede, inherite, and possesse all *Lands, Goods, and Chattels, &c.* as fully and amply as the Subiects of either Realme respectiuely might haue done, or may doe in any sort within the Kingdome where they were borne.

The Commis-
sioners autho-
rized by Parli-
ament, did be-
gin 20. Octob,
and did conti-
nue vntill 6.
Decemb. 2.
Jacobi.

The resolu-
tion of the Cō-
missioners.

This, after long debating, and graue and deliberate consideration, was, in the end, the resolution of the greater part of the Commissioners, not one openly gainsaying it. And diuerse of the principall Judges of the Realme were present at all times when the point was debated. And herein I note the wise and iudicious forme of that resolution, which was not to propound to the Parliament the making of a new Lawe, but a declaration of the common Lawes of both the Realmes in this question.

Now, if wee consider who these Commissioners were, what Lords of the higher House, and what persons of the common House, selected of all degrees, most eminent for their learning and iudgement, as well in Ciuile and Common Law, as in knowledge, and experience other waies, beeing assisted by the graue Judges of the Realme : If this, I say, be well considered, then this Resolution must be accompted and esteemed as a matter of

great and weighty importance, and much to be regarded in the deciding of this question.

The Judges
opinion in
Parliament.

According to this Act of the Commissioners, the Case was propounded in the next Session of Parliament. In the higher House, the Judges were required to deliver their opinions. There were then eleven Judges present; whereof tenne did with one vniforme consent affirme the Lawe to be, That the *Post-nati* were not Aliens, but naturall subjects (one onely dissenting.) After this, the Question was debated in a solemne Conference betweene both the Houses of Parliament at severall times, and at great length, and with much libertie: Nothing was omitted that Wit or Art could invent to object against this opinion; And that was done by men of great learning, and singular judgement in the Common Lawe, and Ciuite Lawe; and by some other Gentlemen of the Common House, of rare

gifts for their learning, knowledge, elocution and experience.

At this Conference the Judges were present ; who , after they had heard all that was , or could be said , did confirme their former opinions , which they had before deliuered in the higher House : Three of the chiefe of them declaring their reasons , and all the rest (sauing one alone) concurring in the same . So , here was now a generall resolution by all the Judges of the Realme (one excepted) and that deliuered , not priuately , but in Parliament ; which without more adoe had beene sufficient to haue decided and determined this Question .

The force and
strength of the
Kings procla-
mations.

Touching the Proclamation, it was discreetly and modestly saied by a learned Gentleman of the lower House , That it was of great respect , and much to bee regarded ; but yet it was not binding , nor concluding : for , Proclamations can neither make , nor declare Lawes : And be-

sides, that this Proclamation was not grounded vpon any resolution of the reuerend Judges; but vpon the opinion of some skilfull in the Lawes of this Land.

Of the strength of Proclamations, being made by the King, by the aduise of his Counsell and Judges, I will not discourse; yet I will admonish those that bee learned and studious in the Lawes, and by their profession are to giue counsell, and to direct themselues, and others, to take heede that they doe not contemne, or lightly regard such Proclamations.

And to induce them thereunto, I desire them to looke vpon, and consider aduisedly these few Proclamations, Prouisiōns, or Ordinaunces, which I will point out vnto them; and of what validitie and force they haue beene houlden to bee in construction of Lawe, albeit they be neither Statutes, nor Acts of Parliament.

M.4.H.3. in Dower, the defendant pleaded, *Quod petens est de potestate Regis Franciae, & residens in Francia; Et prouisum est*

Fitzh. Dower.
179.

à Confilio Regis, quod nullus de potestate Regis Francie respondeatur in Anglia antequam Angli respondeantur de iure suo in Francia. This the Plaintif's Attorney could not denie; and thereupon the judgement was, *Ideo sine die.*

Anno 20. Hen. 3. certaine Prouisions and Ordinaunces were made which were called *Prouisiones Merton*, where the King assembled his Archibishops, Bishops, Earles, and Barons for the Coronation of the King, and his wife Queene Elenor; and the words be, *Prouisum est in curia Dom. Regis apud Merton corā Willihelmo Cantuariensi Archiepiscopo, & Coepiscopis, Suffraganeis suis; Et coram maiori parte Comitum & Baronum Angliae ibidem existentium pro Coronatione ipsius Domini Regis & Helionoræ Reginae, pro qua omnes vocati fuerunt: Cum tractatum esset de communi utilitate Regni super articulis subscriptis. Ita prouisum fuit & concessum, tam a predictis Archiepiscopis, Episcopis, Comitibus, & Baronibus, & alijs. De viduis primò* *Item in annalibus*

Fitzherbert citeth a Prouision made Anno 19.H.3. in these words, *Et prouisum fuit coram Domino Rege, Archiepiscopis, Episcopis, Comitibus, & Baronibus, Quod nulla Affisa ultime presentationis de cetero capiatur de Ecclesiis, Præbendatis nec de Præbendis.* This Prouision was alowed and continued for Lawe, vntill W. 2. Anno 13. Edw. 1. ca. 5. which prouides the contrary by expresse words.

Anno 6. Ed. 1. the King and his Judges made certaine Explanations of the Statute of Gloucester, which are called *Explanationes statuti Glocestriae*: And these be the words. *Postmodum per Dominum Regem & Iusticiarios suos factæ sunt quedam Explanationes quorundam articulorum superius positorum.* Which Explanations haue euer since beene received as a Law.

There is a Proclamation by King Ed. 3. bearing Teste at Westminster Anno 15. Edw. 3. And Judge Thorpes opinion Pa. 39. Ed. 3. 7. both which I will now forbeare to report, and wish the Students to reade the same

Fitzherbert
Nat. Br. 32.

Anno 6. Ed. 1.
Explanationes
Glocestriae.

A Proclama-
tion. 15. Ed. 3.

in

in the printed Bookes, where they shall see both the effect, and the reason, and the cause thereof ; They are worth their reading, and may informe and direct them what judgement to make of Proclamations.

How the Judges opinion delivered in parliament ought to be regarded.
Obiect.

Touching the opinion of the Judges, some haue obieected (yet modestly, and I suppose, according to their conscience and vnderstanding) That there is not like regarde to be had of Judges opinions giuen in Parliament, as ought to bee of their iudgements in their proper Courts and Seates of Justice : for, in those places their Oath bindeth them ; but notso in the other.

Reffons.

1. To this I answere : The reuerence, and woorthinesse of the men is such, as is not to bee quarrelled and doubted of, if there were no Oathe at all : For, if men of so great and eminent places feare not God and his iudgements, euen out of a

religious conscience, which is *Frenum ante peccatum, & flagrum post peccatum*, it may be doubted that the externall ceremonie of adding a Booke will little auaile.

16. 2 Their Oath doth bind them as much in the Court of Parliament, as in their proper Courts: for, that is the supreme Court of all; and they are called thither by the Kings Writ, not to sit as Tell-clockes, or idle hearers; but, *quod personaliter interfitis nobiscum, ac cum ceteris de Consilio nostro super dictis negotijs tractaturi, vestrumq; Consilium impensuri*: And those Negotia be *Ardua & urgenter negotia Regni &c.* And their Oath, amongst other things, is, That they shall counsell the King truely in his busynesse.

3 This Exception may serue against the Judges, as well in Cases when they sit and giue iudgement, as Iustices of Assises, *Nisi prius, Oyer and Terminer, and Gaole Deliuerie*, as in this Case of Parliament: for, there they haue none other Oath but their generall Oath.

4 It becomes vs to esteeme of Judges now, as our forefathers esteemed them in times past ; for , as they succeede them in Time and Place (I thanke God , and the King , I haue neither cause to feare any for displeasure , nor to flatter any for fauour : wherefore I will neither be afraid , nor abashed to speake what I thinke :) I say therefore , that as our Judges now succeed the former Judges, in Time and Place ; so they succeede them, and are not inferior to them in Wisedome, Learning, Integritie, and all other iudicious and religious Ver-tues.

Then let vs see what the wisedome of Parliaments in times past attributed to the Judges opinions declared in Parliament ; Of which there bee many Exam-ples ; but I will trouble you but with two or three.

I wil not remember Richard the seconds time (of which some of our Chroniclers doe talke idely , and vnderstand little) where power and might of some potent

persons

persons oppressed justice, and faithfull Judges, for expounding the Law soundly, and truely. The first that I will remember, is this.

In the Parliament 28. H.6. 16. Ianuarij, the Commons made suite, That *W. de la Poole* Duke of *Suffolke* should bee committed to prison for many treasons and other hainous crimes committed by him. The Lordes in Parliament were in doubt what answer to giue ; they demaunded the opinion of the Judges : Their opinion was, Thathee ought not to bee committed ; And their reason was, for that the Commons did not charge him with anie particular offence, but with generall flaunders and reports ; And therefore because the Specialties were not shewed, hee was not to bee committed. This opinion was allowed; And thereupon 28. Ianuarij, the Commons exhibited certaine speciaill Articles against him, *viz.* That hee conspired with the French King to inuade

the Realme &c. And thereupon hee was committed to the Tower.

2 In the Parliament *Anno 31. H.6.* in the vacation (the Parliament being continued by prorogation) *Thomas Thorpe* the Speaker was condemned in a thousand pounds damages in an action of Trespass ; brought against him by the Duke of Yorke , and was committed to prison in Execution for the same . After, when the Parliament was re-assembled, the Commons made suite to the King and the Lords , to haue *Thorpe* the Speaker delivered , for the good exploite of the Parliament ; whereupon the Duke of Yorke's Counsell declared the whole Case at large . The Lords demaunded the opinion of the Judges, whether, in that Case, *Thorpe* ought to bee delivered out of prison by Priuilege of Parliament : The Judges made this aunswere , That they ought not to determine the Priuilege of that high Court of Parliament ; But for

the declaration of proceeding in lower Courts, in cases where Writtes of *Super-
fedeas* for the priuiledge of the Parliament
be brought vnto them, They aunswere:
That if any person that is a Member of
the Parliament bee arrested in such cases
as bee not for treason or felonie, or for
suretie of Peace, or condemnation had
before the Parliament, it is vsed that such
persons be released; and may make At-
turney, so as they may haue their free-
dome and libertie, freely to intend the
Parliament. Hereupon it was concluded,
That *Thorpe* should still remaine in pri-
son according to the Lawe, Notwithstan-
ding the priuiledge of Parliament, and
that hee was the Speaker. Which resolu-
tion was declared to the Commons by
Walter Moyle, one of the Kings Serieants
at Lawe. And then the Commons were
commaunded in the Kings name, by the
Bishop of *Lincolne* (in the absence of the
Archbishop of *Canterbury* then Chauncel-
lor) to choofe another Speaker.

3 In the Parliament An. 7 H. 8. a Question was moued, Whether spirituall persons might bee conuented before temporall Judges for criminall causes ; There sir *John Fineux* and the other Judges deliu-
red their opinion, that they might and ought to bee so. And their opinion was allowed, and maintained by the King and the Lords : And D. *Standifb*, who before had houlden the same opinion, was deli-
uered from the Bishops. And it is worth the noting, what wordes passed in that Case betwenee the Archbishop of *Canterbury*, and that worthy Judge *Fineux*.

Writs of Errour sued in parliament.

4 If a Writ of Errour bee brought in Parliament vpon a Judgement giuen in the Kings Bench, the Lords of the higher House alone (without the Commons) are to examine the Errours ; But that is by the advise and Counsell of the Judges, who are to informe them what the Lawe is, and so to direct them in their iudgement. And if the judgement bee reuersed,

then

then commaundement is to bee giuen to the Lord Chancellour to doe Execution accordingly. And so it was in *Anno 17.R. 2.* in a Writte of Error brought in Parliament by the Deane and Chapter of *Lichfield*, against the Prior and Couent of *Newport-Panell*, as appeareth by the Record. But if the iudgement bee affirmed , then the Court of the Kings Bench are to proceede to execution of the Iudgement , as it appeareth in *Flowerdewes Case P.1.H.7.* fol. 19. But it is to bee noted , that in all such Writtes of Error , the Lords are to proceede according to the Lawe ; and for their iudgement therein they are informed and guided by the Judges , and doe not follow their owne opinions or dispositions otherwise.

This extrauagant Discourse touching Proclamations , and Judges opinions deliuered in Parliament , and how they ought to bee regarded , I haue thought materiall and necessarie , both in respect

of the time wherein wee liue, and the Matter which we haue in hand : And these bee thinges which I thinke haue beeene too lightly passed ouer : But if you condemne it as impertinent, I must then confess I haue presumed too much vpon your patience; I pray you beare with mee , it is but my labour lost , and a little time mis-spent, if it seeme so vnto you : You are wont to pardon greater faultes ; Call it either a *Passe-time* , or *Waste-time* , as pleaseth you. Now, to returne to the Case we haue in hand.

The proceſſe
and forme of
proceeding in
the Case of R.
C. now in que-
ſtion.

The generall Question hauing had this passage (by Proclamation, by Commission , and by debating in Parliament) remaineth yet without cōclusion or iudgement : And as euerie man abounds in his owne fense, so every one is left to his owne opinion ; Specially those that were not satisfied with the graue Resolution of the Judges in Parliament , which (although some may tearing and accompt

as bare opinions) I must alwayes valem, and esteeme as a reall and absolute iudgement. Now, I say, this generall Question is reduced to two particular Cases, and is iudicially depending in two the highest Courts of Justice in this Realme ; and that is by one Complainant against severall Defendants for the freehoulde and inheritance of severall parcells of Land : and (as M. Solicitor said well) is a Case, not fained, nor surmised, but a true Case betweene true parties : And being *Quæstio iuris, non facti*, is by both these Courts adiourned hither to bee decided, and determined by all the Judges of *England*, as the rarenesse of the Case, and the weight and importaunce of it, both for the present and the future doth require.

And the Case being of this nature and qualitie, it is not amisse to obserue the proceeding in it : for, it is woorth the obseruing, and not to bee forgotten. The Defendants counsell, men of great learning, and in their profession inferiour to

none of their qualitie and degree, men conuersant and well exercised in the Question, and such as in the great conference in parliament, most of them were specially selected & chose (for so they wel deserued) as most sufficient, able, and fit, as well for Learning and Knowledge, as for all other giftes of Witte and Nature, to handle so great and rare a Question. And although it hath pleased them of their good discretion to vse the paines but of a few in the debating and arguing of the Case at the Barre : yet no doubt that was done vpon mature deliberation and conference with all the residue : And whatsoeuer the Spri-
rites, the Learning, the Wisedome, and Knowledge of all the others, vpon long study could afforde, was put into the mouth of those few to serue as Organs and Instruments to deliuer it vnto vs; which they haue so well and sufficiently performed, that they deserue great praise and commendation : For, in my poore opinion, the witte of man could not de-

use to say more touching this Question in Lawe than they haue saied. And whatsoeuer hath beeene fithence spoken for that part , it is for the Matter but the same in substance , which he counsell at the Barre did deliuier ; though it hath beeene varied in forme , and amplified with other wordes and phrases , and furnished with shew of some other strained Cases and authorities.

The handling of it by the learned and reuerend Judges , hath beeene such , as it may appeare to the world , that euerie one hath spoken his owne heart and conscience ; and hath laboured by long studie to search out the Lawe and the true reason of the Lawe in this rare Case ; and so they haue spoken , as *Coram Deo & Angelis*: None , with desire to seeme popular ; for nothing ought to bee *tam populare quam veritas*: None to seeme to be Time-servuers , or Men-pleaserts ; for the King (whome vnder God they serue) being *Pater patriæ*, and soueraigne head of both these great

vnited Kingdomes, is to them both, like as the head of a naturall body is to all the Members of the same, and is not, nor can not bee partiall more to one than to an other. Hee deliteth in truth, and desireth it; and without truth hee can not bee pleased. Hee ruleth by his Lawe, and commaundeth his Judges to minister to all his Subiects Lawe and Iustice sincerely, and truely; and equally and indifferent-ly, without any partiall respect.

It was neuer seene, but that in all rare and difficult Cases, there haue beene diuersitie of Opinions; but yet without breach of Charitie, which is the Bond of Vnitie. So it hath happened in this Case. The Case hath beene argued at large by foureteene learned Judges; twelue of them haue concurred in iudgement, but vpon feuerall reasons: for, as many wayes may leade to one end of the iourney; so diuerse and feuerall reasons may conduce to one true and certaine conclusion.

And

And here I may not omit the woorthe
memorie of the late graue and reuerend
Iudge, Sir *John Popham*, chiefe Iustice of
the Kings Bench deceased (a man of great
wisedome, and of singular learning and
iudgement in the Lawe) who was abso-
lutely of the same opinion, as he often de-
clared, as well in open Parliament, as o-
therwise.

The Apostle *Thomas* doubted of the
Resurrection of our Sauiour Iesus Christ,
when all the rest of the Apostles did firm-
ly beleue it : But that his doubting con-
firmed, in the whole Church, the Faith of
the Resurrection.

The two worthy and learned Judges
that haue doubted in this Case, as they
beare his Name, so I doubt not but their
doubting hath giuen occasion to cleare
the doubt in others ; and so to confirme
in both the Kingdomes, both for the
Present and the Future, the truth of the
iudgement in this Case.

Thus, my Lords, haue you hitherto nothing from mee but *Amen*, to that which all the Judges (sauing two) haue saied ; and much more you cannot expect from mee : Yet , since I must give iudgement in this Case ; and I saied in the beginning, that I would render the reasons of my iudgement : (for that is the course of argument I must houlde) I will now deliuere vnto you , what are the speciall and principall reasons that first haue induced mee , and still moue mee to houlde the opinion that I doe : And as I goe I will indeuour to cleare some doubts and questions , that partly in the conference in Parliament , and partly otherwise , I haue heard made ; not onely touching this Case it selfe , but also touching the forme and manner how it is to be decided and iudged.

How this Case
is to be iud-
ged, and by
what Law.

The Case is rare , and new , (as it hath beeene often saied) it was neuer decided *Terminis terminantibus* ; It was neuer iudged by any Statute Lawe , which is a po-

sitive Lawe ; nor by iudgement of the Judges of the common Lawe.

Now , the first Question is (as some would haue it) How it is to be iudged , and by what Lawe ; and haue wished that it might haue stayed vntill the Parliament , and so bee decided by Parliament . They that make this doubt , I will let them demurre , and die in their doubts : For , the Case beeing adiourned hither before all the Judges of *England* , is now to be iudged by them according to the common Lawe of *England* ; and not tarrie for a Parliament : For , it is no transcendent Question , but that the common Lawe can and ought to rule it , and ouer-rule it , as Justice *Williams* said well .

But then this Question produceth another ; That is , What is the Common Lawe of *England* ; Whether it be *Ius scriptum* , or *nonscriptum* ; and such other like niceties : For , wee haue in this Age so many Questionists ; and *Quo modo* and *Quare* , are so common in most mens

What is the
common Law
of England:
& whether it
be *Ius scriptum*

Questionists

mouthes,

mouthes, that they leau neither Religion, nor Lawe, nor King nor Counsell, nor Policie, nor Gouernment out of question.

And the end they haue in this Question, What is the Common Lawe? is to shake and weaken the ground and principles of all governement: And in this particular Question of the Law of *England*, to ouerthrow that Law whereby this Realme hath many hundred yeares beene governed in all honour and happinesse: or at least to cast an aspersion vpon it, as though it were weake and vncertaine. I will therefore declare mine opinion in this point plainly and confidently, as I thinke in my conscience, and as I finde to be sufficiently warranted by ancient Writers, and good authorities voide of all exception.

The ground
of the Com-
mon Law.

The common Law of *England* is grounded vpon the Law of God, and extendes it selfe to the originall Lawe of Nature, and the vniversall Lawe of Nations.

When it respects the Church, it is called *Lex Ecclesiae Anglicanae*, as *Magna Charta ca. 1. Ecclesia Anglicana habeat omnia sua iura integra & illesa.*

When it respects the Crowne, and the King, it is sometimes called *Lex Coronae*, as in Stat. 25. Edw. 3. cap. 1. *Lex Coronae Angliae est & semper fuit &c.* And it is sometimes called *Lex Regia*, as in *Registro fo 61. Ad iura Regia spectat : And, Ad conseruacionem iurium Coronae nostrae, & ad iura Regia ne depereant &c.*

When it respects the common subiects, it is called, *Lex Terræ*; as in *Magna Charta ca. 29. Nisi per legale iudicium parium, vel per legem Terræ.*

Yet, in all these Cases, whether it respects the Church, the Crowne, or the Subiects, it is comprehended vnder this generall tearme ; The common Lawes of England : Which although they bee for a great parte thereof reduced into writing ; yet they are not originally *Leges scriptæ*.

This I first learned of the late Lord Tre-

The common
Law is not o-
riginally *Lex
scriptæ*.

surer Burleigh (whose Honourable memorie England can never forget) and hearing it from him, I indeuored by my priuate studie to satisfie my selfe thorowlie in it. And, whosoeuer shall well consider the Lawes of *England*, which were before the Conquest (whereof wee haue some Remnants and Patches) or since the Conquest vntill *Magna Charta, Anno 9. H.3.* will make little doubt of it.

In *H.2.* time *Glanuile* writeth thus; *Leges Anglicanas licet non scriptas, leges appellari non videtur absurdum.*

And in *Hen. 3.* time *Bracton* writeth thus; *Cum autem ferè in omnibus Regionibus vtantur legibus & iure scripto, sola Anglia vsa est in suis finibus iure non scripto & consuetudine; in ea quidem, ex non scripto Ius venit quod vsus comprobavit.*

But I may not agree with *Bracton*, that *Sola Anglia vsa est iure non scripto*: For I find that the grauest, and the greatest learned Writers of the *Ciuite Lawe*, both auncient

and of this our time, doe hould the same opinion, touching the Ciuile Lawe it selfe, for thus they write : *Ex non scripto Ius venit quod vsus approbauit.* And thus; *Ius Ciuile dictum ex non scripto natum est.* And; *Ius non scriptum dicitur Consuetudo, non quod scripto perpetuo careat, hoc enim falsum est.* Nam & *Consuetudines in memoriam constanter reducuntur in Scripturam, ut cetera quoq; qua sine scriptura perficiuntur: Sed non scriptum ius est: id est, quod à scriptura vis eius non coepit nec pendeat.* So hereby it may appeare how in this wee concurre with the Ciuile Lawe.

But hereupon these Questionists moue an other Question, viz. If the common Lawe be not written, howthen shall it be knownen?

How the common Law of England may be knowne.
Obiect.

Respons.

To this I aunswere; It is the common custome of the Realme (as Bracton saith, *Ius venit quod vsus comprobauit:*) And it

standeth vpon two maine pillers & principall parts, by which it is to bee learned and knownen.

Maximes and
Principles.

The first is, certaine knowne principles and Maximes, and ancieut Customes, against which there neuer hath beene, nor ought to bee any dispute. As in Cases of Subiects ; an estate in Fee-simple, for life, for yeeres, Dower, Curtesie &c.

In Cases of the Crowne , the Female to inherite : the Eldest sole to bee preferred : No respect of Halfe Blood : No tenant in Dower , or by the Courtesie of the Crowne : No disabilitie of the Kings person by infancie &c.

*Responsa pru-
dentum.*

The second is, where there be no such Principles, then, former iudgements giuen in like Cases : And these be but *Arbitria Iudicium, & Responsa Prudentum*, received, allowed, and put in practise and execution by the Kings authoritie.

Of these Bracton speaketh ; *Ego H. de Bracton animum erexi ad vetera Iudicia iustorum perscrutanda ; facta ipsorum, Consilia, & Responsa in unam summam redigendo compilaui.*

And before the Conquest, King Ethelbert caused a Booke to bee made, which was called *Decreta Iudiciorum* : And king Alured did the like, as master Lambard a iudicious and learned obseruer of Antiquities, doth remember.

Of these also the Judges speake H.33.
H.6. Moyle, fo.8. *We rule the Law according to the auncient course.* Ashton, fol.9. *All our Lawe is guided by Use, and by Statute.* And Prysot saith, fol.9. *There cannot be a positiu Law, but such as was iudged or made by Statute.* Wherein I note also that hee equalleth a Iudgement with a Statute.

In 36. H.6. fol. 25. Fortescue reasoneth thus ; *The Lawe is as I haue said, and so hath beene alwaies since the Lawe beganne.*

In 37.H.6.f.22. Aſcue reasons thus ; *Such a Charter hath bin allowable in the time of our*

Lambard in explicatione verbi Hyde.

Predecessours, which were as sage and learned as we be.

In H.4.Edw. 4. fol. 41. Markham reasoneth thus; *It is good for vs to doe as it hath bin vsed before this time, and not to keepe one way one day for one party, and another day the contrary for the other party: And so the former Precedents be sufficient for vs to follow: And iudgemente was giuen accordingly.*

Anno 36.H.6.

And in the former Case 36.H.6. Forescuse saith further; *Wee haue many Courses and Formes whiche houlden for Lawe.*

Also euerie one of these foure principall Courts, The Chauncery, Kings Bench, Common-plees, and Eschequer, haue in many things seuerall courses and formes which are obserued for Law, and that not onely in that proper Court, but also in all COURTES through the Realme; whereof many Examples bee remembred in the Case of the Mines in *Plowdens Commentaries.*

*In novo casu no-
sum remedium.*

The third : But if there be no such for-

mer Judgements, nor direct Examples or Precedents, then this Rule hath a further extention, which is this.

There is a Rule in the common Lawe, that *in now casu nouum remedium est apponendum*. Et concordent Clerici de Breue faciendo, ita quod nullus recedat à Cancellaria sine remedio. For the Chācery is properly *Officina Iustitiae & AEquitatis*; where all original writs (which in ancient times were the Grounds of all Suites) are devised and framed. And these Clerici were graue and auncient men; skilfull, & long experienced in the course of the Chancerie; and called *Clerici de prima forma*: And of late time *Magistri Cancellariae*; who in new and strange cases, besides their owne knowledge and experience, had oftentimes conference with the graue Judges for the deuising and framing of new Writtes when neede required. And this I take to bee the same which is in the Statute *W.2. cap.24.* *Et quotiescumq; de cetero euenerit in Cancellaria, quod in uno casu*

*St. W.2. cap.24.
Anno 13. Ed. 1.*

reperi-

neperitur breue, & in consimili casu, cadete sub eodem iure & simili indigente remedio, non reperitur, Concordent Clerici de Cancellaria in breui faciendo, vel atterminent querentes in proximum Parliamentum. Et scribantur casus in quibus concordare non possunt, & referant eos ad proximum parliamentum : Et de consensu Iurisperitorum fiat Breue, ne contingat de cetero, quod Curia Regis deficiat conuentibus in Iusticia perqurenda.

Wherein I note these three thinges : First, The Clerkes are to agree ; and if they agree, that is an end, and standes for Lawe, and then no referrement to the Parliament. Second, If the Clerks agree not, and so the Case be referred to the Parliament ; Then De Consensu Iurisperitorum fiat Breue. So Consensus Iurisperitorum is the Rule, and not the multitude of vulgar opinions. The third is, That Iustice faile not them which complaine : Which will often faile, if you stay vntill a Parliament : For Parliaments are not to be called for the wrong of a few priuate Subiects : but for

the great and vrgent affaires of the King
and the Realme.

I finde also a like Rule in the Ciuite
Lawe; *Vbi non est directa lex standum est ar-*
bitrio Iudicis, vel producendum ad similia. And
another saith, *De similibus ad similia iudici-*
um & argumentatio recipiuntur.

Vbi non est di-
recta Lex &c.

Rex solus iudi-
catur &c.

4 Besides these, there is an other
generall and certaine Rule in the Ciuite
Lawe, which I referue to the last parte of
that which I meane to speake in this Mat-
ter.

So, leauing that vnto a more proper
place, I will hereupon conclude, That
if there bee no former Judgements, nor
Examples, nor Precedents to bee found,
then *Concordia Clericorum, & Arbitrium Iu-*
dicum is to seeke out the true and solide
reason; and thereupon to ground their
Judgements in all new Cases: For it was
truely saide by a learned Gentleman of the
lower House, *Deficiente lege & recurrendum est*
ad consuetudinem: Deficiente consuetudine re-

6

currendum ad rationem. And so from the Judges we shall haue *Responsa prudentum* to decide all such new Cases and Questions. And according to this Rule, all such new doubts and questions haue beene resolued and decided by the graue Judges in former times.

A requeste
the professors
of the Ciuite
Lawe.

But here, before I proceede further, I am to make a suite, which is this:

That whatsoeuer I haue spoken, or shall happen to speake of the Ciuite Lawe; or whatsoeuer I shall cite out of any Writer of that Law, I pray fauor of my Masters that profess it. I acknowledge that Lawe to be auncient and generall in many parts of the world; and I reuerence the professors of it, as men of great learning, wisedome, and iudgement. I profess it not; I haue learned little of it; but in that little I haue found that in the reall and essentiall partes of Justice, the Ciuite and common Lawe doe in many things concurre, though they differ much in the

forme

forme and manner of proceeding. And that which I shall haue occasion to produce of that Lawe, will bee to shew how the common Law and Ciuite doe agree in one reason and iudgement in those things which I shall speake of.

Yet I must take libertie to say, That neither in *Spaine*, nor in *France* (those two great Monarchies) it is not generally received nor allowed as a concluding and binding Law.

They take there the reason of it onelie as a directiō to their proceeding & iudgement : But to produce or alleadge it as a concluding or binding Law, was no lesse than *Capitis pœna*.

This I make not of my selfe; for, besides common practise and experience, I haue an honest and substantiall witnesse, Master *Adam Blacwood* a Scottishman, a man of singular learning in the Ciuite Lawe, who defendeth in like manner the Lawes of *Scotland*, as appeareth in his learned Booke intituled, *Pro Regibus Apo-*

Blacwood ca. 10

logia, written by him against a seditious Dialogue or Libell made by George Buchanan, *De iure regni apud Scottos*, where he tells him, *Aliud Sceptrum, aliud Plectrum*. But it is not amisse to recite his owne words, which are thus; *Philippus cognomento Pulcher, cum Lutetiae supreme iurisdictionis curiam institueret, eam Romano iure solutam esse declarauit: in eamq[ue] sententiam vetus extat eius Curia decretum, ne causarum patroni Romanarum Legum auctoritatem patriæ legibus opponant. Sed cum illæ bono & aequo niti videntur & probabilem utilitatis publicæ causam continere, nos earum utimur haud imperio, sed ratione cui omnes homines naturæ præscripto subiiciuntur. Quin et si quid aduersus rationem legum Romanarum perperam ac temerè iudicatum est, id earum multis pœnis haud aestimatur, sed vel Principis, vel superioris magistratus arbitratu. Nam cum in publici muneric partem admittimus, & conceptis verbis inauguramus, solemnis sacramento regiarum & municipalium legum atq[ue] morum obseruationem, nulla Romanii juris mentione, spondemus. Apud Hispanos*

capitis pœnam ijs indictam legimus qui Romanarum legum auctoritatem vel in foro laudarent, vel in puluere scholastico profiterentur. Sed si quid occurreret patrijs legibus ac moribus indefinitum quod iudicanti religionem adferret, vnicum erat eximendo scrupulo regis consulendi remedium. Alaricus Tolosæ regnans, idem Gothis imperauit, vt si quis aduersus ipsius leges, Ciuale Romanorum ius citaret, temere factum morte lueretur.

Now to retурne to that which I haue touched before, I say, that when there is no direct Lawe, nor precise Example, we must Recurrere ad rationē, & ad responsa prudentum: For, although *Quod non lego, non credo*, may bee a true and certaine rule in Diuinitie; yet for interpretation of Lawes, it is not alweies so: For wee must distinguish betwenee *fidei moralē*, and *fidei diuinam*, or else wee shall confound many things in the ciuile and politike gouernement of Kingdomes and States. For, the first Precedent which wee haue now, had no precedent when it began; But as Taci-

*Recurrēd. ad
Rationē &c.*

*Quod non lego
non credo.*

tus saith, *Quae nunc vetustissima creduntur noua fuerunt, & quod hodie exemplis tuemur, inter exempla futurum est.* And to thole that hould, that nothing is to bee done but by former Examples, Horace speaketh thus; *O imitatores seruum pecus:* And Cicero saith, *Non exempla maiorum querenda, sed consilium est eorum à quibus exempla nata sunt explicandum.*

Thus hath Justice beene duely administered in *England*, and thereby the Kings haue ruled, the people haue beene governed, and the Kingdome hath flourished for many hundred yeeres; and then no such busie Questionists moued any quarrell against it.

Exposition
of Statutes.

Thus haue all doubts growing vpon *Magna Charta*, and *Charta de Foresta*, made in King *Henry* the thirds time, and vpon the Statutes of *Westmin.1.* *Westm.2.* *Westm.3.* and many other Statutes made in *Ed.1.* time: And vpon *Prerogativa Regis*, and many other Statutes made in *Ed.2.* time, beene from time to time ex-

poun-

pounded ; and so of later times , the Statutes of Fines, of Vses, of Willes , and many moe.

Thus also haue all Doubts and Cases, whereof there was no Statute or Positiue Lawe , beene alwaies expounded : for such are most of the cases which wee haue in our Yeere-Bookes , and Bookes of Reports, which are in effect nothing but *Responsa prudentum*, as Iustice Crooke did truly say.

Vpon this reason it is, that some lawes, as well Statute Lawe, as common Law , are obsolete and worne out of vse : for, all humane lawes are but *Leges temporis* : And the wisedome of the Judges found them to bee vnmeete for the time they liued in, although very good and necessarie for the time wherein they were made. And therefore it is saide, *Leges humanae nascuntur, vi- gent, & moriuntur, & habent ortum, statum, & occasum.*

By this Rule also, and vpon this reason it is , that oftentimes auncient Lawes are

Exposition
of Lawes.

Lawes ob-
solete.

Lawes chan-
ged.

changed

changed by interpretation of the Judges, as well in Cases criminall as ciuile.

In criminall cases the Law was *Voluntas reputabitur profacto*; but it is not so now, sauing in treason onely.

In an appeale of Maime Britton fol. 48. faith, *Soit le Iudgement, que il perde autiel member, come il auer tolle a le plaintife*; but it is not so now.

In auncient time, one present, aiding, comforting, and assiting to a murder, was taken to bee no principall, but an accessorie, as it appeareth M.40. Edw.3. fol. 42. & 40. li. Ass. p.8. & p. 25. But now in that case hee is iudged a principall. And so it was ruled by all the Iustices M.4.H.7. 18. and so *Plowden* affirmeth the Lawe to be, in his *Commentaries* fol. 99. & 100.

In ciuile causes in auncient time, the Lawe was houlden, That hee in Remainder in Taile could not haue an action of Waste, nor bee receiued vpon default of tenant for life: But afterwards, the Lawe was often iudged otherwise; and so is

the common experience and practise at this day.

In *Anno 40. Ed. 3.28.* *Fynchden*, chiefe Justice of the common place, saith, that in ancient time the Vicar could not haue an Action against the Parson; But hee saith the contrarie is vsed at this day, which is the better.

In ancient time a Difseisee could not enter vpon the feoffee of the Difseisor, for saving of the warrantie; but for many yeeres the Lawe hath beene houlden otherwise, and so the common practise yet remaineth.

By this Rule it is also, that words are taken and construed, sometimes by Extension; sonetimes by Restriction; sometimes by Implication; somtimes a Disiunctiue for a Copulatiue; a Copulatiue for a Disiunctiue; the present tense for the future; the future for the present; sometimes by equity out of the reach of the wordes; sometime words taken in a contrary sence; sometime figuratiuely, as *Continenſ pro con-*

Construction
of words,

Judges con-
sulted with
the priuie
Counsell,

39.Ed.3.i.Ac
P.1.

tento, and many other like : And of all these, examples be infinite, aswell in the Ciuite lawe as Common lawe.

And oftentimes the reuerend Judges haue had such a graue regard in their proceeding, that before they would resolute, or giue iudgement in such new cases, they desired to consult with the Kinges priuie Counsell ; as appeares in diuerse cases in king Ed.3. histime.

R. VV. assaulted *Adam Brabson* in presence of the Iustices of Assise at *Vvinchester*, for which *A. B.* complained by Bill before the saide Iustices , alledging this offence to bee in despite of the King and his Iustices , to his dammage of an hundred pounds. *R. VV.* pleaded, Not guiltie ; and was found guiltie, and damages taxed to tenne pounds. Thereupon the Judges awarded him to prison in the Sherifes keeping. And for the Fine , and that which should be further done for the King, for the assault done in the presence of the Judges , they would haue the ad-

uise

M. 19. Ed. 3.
Judgement 174

use of the Kings Counsell : For in a like case , because R. C. did strike a Iurour at Westminster , which passed in an Enquest against one of his friends , It was adiudged by all the Counsell , that his right hand should be cut off; and his lands and goodes forfeited to the King . These bee the words in the Booke .

In this case I note three things .

1. The Judges consulted with the Counsell .

2. They had a like Case before when the Counsell was also consulted with , viz. An. 19. E. 3. and yet they would not proceede in this case before they had againe consulted with the Counsell .

3. That before Anno 19. Ed. 3. there was no like case nor precedent for such a Judgement ; And therefore the Judges would not of themselues pronounce that heauy Judgement before they had conferred with the Counsell touching the same . And after they had the opinion

and aduise of the Kinges Counsell, they proceeded to that Iudgement.

M.39.Ed.3.31

Thomas Vghtred Knight, brought a *Forme-done* against a poore man and his wife ; They came and yeelded to the Demaundant, which seemed suspitious to the Court : whereupon they examined the Matter , and staied Iudgement , because it was suspitious. And *Thorpe* saied, that in the like Case of *Giles Blacket* it was spoken of in Parliament : And wee were commaunded , that when any like Case should come, we should not go to iudgement without good aduise. Wherefore sue to the Counsell, and as they will haue vs to doe, wee will ; and otherwise not, in this Case.

M.40.Ed.3.34.

Greene and *Thorpe* were sent by the Judges to the Kings Counsel (where there were 24. Bishops and Earles) to demand of them, whether by the Statute 14.Ed.3.ca.6. a word may be amended in a Writ,

as wel as a letter or a sillable: for, the statute speakes but of a letter or a sillable; & it was answered, That it may well be amended; For, there can not bee a Word without a Sillable ; and that it was a nice Question of so sage men.

Thus *Arbitria Iudicium*, and *Responsa prudentum* haue beene receiued , allowed, and reuerenced in all times as Positiue Lawe ; and so it must be still ; For, otherwise much mischiefe and great inconuenience will ensue : for new cases happen euery day : No lawe euer was, or euer can be made that can prouide remedie for all future cases; or comprehend all circumstan- ces of humane actions which Judges are to determine : Therefore, when such hap- pen , and complaint is made ; what shall Judges doe ? Shall they giue no remedie to the partie grieued ? Shall they stay for a Parliament ? *Interim patitur iustus*. They must therefore follow *Dictamen rationis* ; and so giue speedie iustice. And in ma-

ny
B

Judges to be directed by reason and discretion.

ny matters of materiall circumstances they must guide themselues by discretion.

As in iudging vpon Presumptions; To discerne which be *Præsumptiones temerariae*, which *Probabiles*, which *Violentæ*.

So for Time ; what is a conuenient Time , and what not.

So for Waste ; what is Waste punishable, and what not.

So for Tenders of money ; what is a conuenient place for tender of mony, and what not : and what is a lawfull Tender, and what not.

So for Disparagement ; what is a disparagement , and what not : And so of other the like cases, which are infinite.

Obiect.
That the common Lawe is
vncerten.

of exhortation
vnderstanding
but not for
any other

Ifit be said(for so some haue said) That if this be thus, then the common Lawe of England is vncerten ; and so the rule of Iustice, by which the people are gouerned, is too pliable, and too weake, and vncerten.

By the same reason it may be said, That all the Lawes of all nations are vncerten: For, in the Ciuite Lawe, which is taken to be the most vniuersall and generall Lawe in the world, they hould the same rule and order in all cases which be out of the direct words of the Lawe; and such cases bee infinite: For, as Isaied, new cases spring euery day as malice and fraude increaseth. And since the Roman Empire beganne, most of their Lawes be either *Edicta Principum*, or *Arbitria Iudicium*, or *Responsa prudentum*. And in their Judgements they are guided by Arrests and former Judgements, as may appeare in the books of many that haue collected such Arrests. And they attribute so much to such former Judgements, That as Prysot equalleth them to a Positiv Lawe, so they hould, That *Sententia facit Ius, & res iudicata pro veritate accipitur, & legis interpretatio legis vim obtinet.*

Nay (which is more vncerten) sometimes they relievpon Doctours opinions

deliuered in their Prelections and Treatises. And when they finde them varying, and differing one from another (as sometimes they doe) then they preferre that which is *Communior opinio*: And so in good reason they may : For, *Pluralitas idem sententium semper superat ; quia facilius inuenitur quod à pluribus queritur.*

But to conclude this point , I would aske of these Nouelists, what they would haue done in *Sibill Belknappes* case, if they had liued in *Henry the fourths* time ?

M.3.H.4.7.

Sir *Robert Belknappe*, that reuerend and learned Judge , of whome sundrie noble and worthie persons , and some now of great & eminent place in *England* are descended, was banished out of the Realme, (*Relegatus in Vasconiam,*) not for any desert or offence of his , but by the might of his potent enemies , and malice of the time. The Lady his wife continued in *England* ; she was wronged ; she brought a Writ in her owne Name alone , not naming her Husband . Exception was taken against

it, because her husband was liuing ; and it was adiudged good, and shee recouered : and the Judge Markeham said;

*Ecce modo mirū quòd fæmina fert breue regis,
Non nominando virum coniunctū robore legis.*

Here was a rare and a new case , yet it was not deferred vntill a Parliament : it was iudged , and her wrong was righted by the common Law of *England* , and that *Ex arbitrio Iudicium, & ex responsis prudentum*; and yet it was counted *Mirum* with an *Ecce*.

Now to apply this to *R.Calvines* case : his case is rare and new, so was that : There is no direct Law for him in precise and expresse tearmes : There was neuer iudgement before touching any borne in *Scotland* , since King *James* beganne his happie raigne in *England* : Hee is the first that is brought in question : So there was no direct Lawe for *Sibill Belknap* to sue in her owne name without her husband , who

was then liuing : nay rather there was direct Lawe against it ; yet by the Lawe of England shée had iudgement to recouer with an *Ecce modo mirum* : So by the lawe of England iudgement ought to bee giuen for *Robert Caluine*, but not with an *Ecce modo mirum* ; but vpon strong Arguments deduced à *similibus*, and *ex dictamine rationis*.

But before I come to those arguments, I wil vse a few words more touching some Rules which I haue read for the interpretation of lawes.

There is a graue and learned Writer in the Civile Lawe that setteth downe foure waies & formes of interpretation of lawes: that is, first, *Interpretatio historica*; secondly, *Etymologica*; thirdly, *Analogica*; fourthly, *Practica*.

In the Argument of this Case all these formes haue beeene vsed, and largely handled : and the two first be those that seeme but light to me, and therefore in mine o-

Note foure
formes of in-
terpretation
of Lawes.

pinion

pinion haue beeene too much stode vpon,
and ouer-weighed.

For the Historicall interpretation , it
is alwaies darke, obscure, and vncerten , of
what kingdome, countrey, or place soeuer
you speake ; I doe alwaies and onely ex-
cept the diuine Histories written in the
Bible.

Historica.

Liu saith, *In tanta rerum vetustate multi
temporis errores implicantur.*

Saint Augustine speaking of the suppo-
sed Bookes of Henoch saith , *Libri isti ob
nimiam antiquitatem reijciuntur.*

Wherefore , for this parte let this suf-
fice , whether in the beginning there were
one or seuerall Kingdomes in great *Britaine* ; or one or seuerall Monarchs and
Kings of these two great & famous King-
domes in great *Britaine*. The King our So-
ueraigne is lawfully and lineally descen-
ded of the first great Monarchs and Kings
of both the Kingdomes ; and that by so
long a continued line of lawfull discent, as

Fergus.
Inas,

therein he exceedeth all the Kings that the world now knoweth ; and therefore to inquire further of Historicall knowledge in this Case, I hould it needelesse.

Etymologica

For the Etymologicall interpretation, there hath beene very much saied , euен as much as Wit and Art could devise : There haue beene alleadged manie Definitions, Descriptions, Distinctions, Differences, Diuisions, Subdiuisions, Allusion of wordes, Extension of wordes, Construction of words ; and nothing left vnsearched to finde what is *Ligeantia*, *Allegiantia*, *Fides*, *Obedientia*, *Subiectio*, *Subditi* ; And who bee *Aborigines*, *Indigenæ*, *Alienigenæ*, *Aduenticij*, *Denizati*, &c. And much of this hath beene drawne out of some Writers of the Ciuite Lawe ; amongst whome the Etymologicall interpretation of the words *Ligens*, and *Ligeantia*, is as vncerten and doubtfull , as it is with our common Lawyers ; And so vpon any of these there cannot be any certen Rule found for Iud-

ges to iudge by, especially in new and rare Cases.

As for Definition, *Vlpian* teacheth vs, *Omnis definitio in iure Ciuitati est periculosa*: and it is said, that *Definitio est duplex*: *Propria*, *qua constat ex genere, & differentia*: *Impropria*, *qua & descriptio vocatur, & est qualibet rei designatio*: So Definition and Description are often confounded, and both vncerten. Then, since both be vncerten and dangerous, I will leau both, and seeke a more certen Rule to iudge by.

As for Etymologie of words, I agree with him which saith, It is *Lewis & fallax*, & *plerumque ridicula*. It is a Pedant Grammarians fault. *Marcus Varro* and others haue bee noted for it. And if you examine the Examples which some doe bring, you will perceiue how ridiculous and vaine it is. So this Rule will not serue to finde out that which wee seeke for: These bee but *Tendiculae verborum, & Aucupationes syllabarum* as one calleth them: It may haue some vse, and

serue a turne in Schooles, but it is too light for iudgements in Lawe, and for the seates of Iustice.

Aquinas setteth downe a more certen Rule, *In vocibus videndum, non tam à quo, quam ad quid sumantur.* And words should be taken *Sensu currenti:* for Vse & Custome is the best Expositor both of Lawes and Wordes, *Quem penes, arbitrium & ius & norma loquendi.*

Wherefore, of the many and diuerse distinctions, diuisions, and subdiuisions, that haue beeene made in this Case, I will say no more but, *Confusum est quicquid in puluerem sectum est:* and will conclude with Bishop Iuel; *A man may wander and misse his way in Mists of Distinctions.*

*Ligeantia sensu
currenti est vincu-
lum fidei &c.*

Then leauing these Historicall and Etymological interpretations, and these curious and subtile Distinctions and Diuisions, I say, *Ligeantia*, or *Allegiantia* vnderstood *Sensu currenti*, is *vinculum fidei & obediencie*, as Justice Daniel said well. And

hee that is borne in any of the Kings Dominions , and vnder the Kings obedience, is the Kings liege subiect , and borne *Ad fidem Regis* (for that is the proper and ancient word which the lawe of *England* hath vsed ; *Ad fidem Regis Angliae*, *Ad fidem Regis Franciae*) and therefore hee cannot bee a Stranger or *Alien* to the King , or in any of his Kingdomes ; and by consequence , is inhablled to haue lands in *England* , and to sue, and be sued in any Reall action for the same.

And *Ligeantia* hath sometimes a more large Extension : For , hee that is an *Alien* borne out of the kings Dominions , vnder the obedience of another king , if hee dwell in *England* , and be protected by the king and his Lawes , hee oweth to the king the duetie of *Allegeance* ; and so hee is *Ligatus Regi* , and *Ligeus Regis* : and if hee commit treason , the Indictment shall bee *contra ligeantio sue debitum*, as it was in Shirley the French-mans Case : yet is hee not the Kings subiect : for, hee was not borne

Ad fidem Regis; But, this is not that Ligeance which wee must finde: For, in a true and lawfull subiect, there must bee *Subiection*, *fides*, & *obedientia*; and those cannot bee seuered, no more than true Faith and Charitie in a true Christian. And hee that hath these three *& natuitate*, is *Ligeus Regis*, and can not bee a Stranger or *Alien* to the King, or in his Kingdomes. And that it is so, may be proued by the Rule of the other two interpretations of Lawe; That is, *Analogica*, & *Practica*.

Analogica.

King James hath now the Kingdomes of *England*, *Scotland*, and *Ireland*, and the Isles of *Gernsey*, and *Jersey* by dissent; all these bee his Dominions, and vnder his subiection and obedience.

King Henry the second had *England* and *Normandy* by dissent, from his mother *Maud* the Empresse; and *Anjou*, and *Maine* by dissent from his father *Geffery Plantagenet*; and *Ireland* by conquest.

Henry the third had *England* and *Ireland*,

by

by discent from his Grand-father *Henry the second* : and *Aquitany* by discent from his Grand-mother *Queene Elenor* wife to King *Henry the second*, and daughter to the duke of *Aquitany*.

Edward the first had all the same by discent ; and parte of *Scotland* by Conquest.

Edward the second, and *Edward the third* had all the same by discent also : and besides, *Edward the third* claimed all *France* by discent from his mother *Queene Isabell*, and had the most part of it in possession ; and so had *Henry the fist* and *Henry the sixt* also.

Now if in these kingstimes, subiectes borne in those Countries, being then vnder their obedience, vvere no *Aliens*, but capable of landes in *England* : And if at this time subiects borne in *Irelād*, or *Gernsey*, and *Jersey* be no *Aliens*, but capable of lands in *England*; then, by an Analogicall interpretation, why should not subiectes borne in *Scotland* be at this time in like de-

gree? For, in proportion, and in likenesse, and conuenience, there can bee no difference at all.

*Practica: &
sic ad similia.*

But whether the subiects borne in those Countries in the time of those kings vvere then capable of lands in *England* as naturall subiects; or were deemed *Aliens*, is the Question: and therein *Interpretatio practica* is to bee considered; and so the Case is brought to be examined *per similia*. And in Diuinitie *Praxis sanctorum est interpres praeceptorum*.

Now then the Question is, Whether the kings Subiects of *England* and *Scotland*, that be *Post-nati*, may be resembled to the Kings subiects of *Ireland*, and the Isles of *Jersey*, &c. as now they bee: and to the subiectes of *Normandie*, *Aniow*, and *Gascoyne*, and parte of *Scotland* in former times, when the same were the Dominions, and vnder the obedience of the King of *England*: (for I speake alwaies, and would be vnderstode of kingdomes and

dominions in possession, and vnder obedience, and not of those whereunto the King hath right, but hath no possession or obedience.) I houlde, that in all points materiall concerning this Question they are alike, though not in all things: (for, then it were *Idem*, and not *Simile*:) and this can not bee better vnderstoode, than by examining the Obiections to the contrary: which in substance may bee reduced to foure in number.

First for *Ireland*, it was gotten by Conquest, and the Conquerour may impose what Lawes hee will vpon them: But it is otherwise of kingdomes comming by dissent.

*Ireland:
Obiectt. 1.*

This is a conceipted difference, and lacks the foundation of Reason, and hath not the true parts of a difference: for those that are borne in *Ireland*, and those that are borne in *Scotland*, are all alike for their birth within the Kings Dominions, and

Respons.

are borne vnder the like subiection and obedience to the King , and haue the like bond ; Nay , euen the same bond of *Alle-giance* ; That is , they are borne *Ad fidem Regis*.

Besides, where it is said , The Conquerour may impose what Lawes hee will : Then consider how it was in the *Interim* before King *John* gaue lawes to *Ireland*.

Nay , which is more , I aske whether the Conquerour of *Ireland* can giue new lawes to *England* , and make Irish men to bee as naturall borne subiectes in *England* (if their birth-right doe not giue it them) which before the Conquest they were not ? for , that is properly the Question : But if any difference bee , the Case of descent is the stronger : For , (as Iustice *Yel- uerton* saide) that is by an vndoubted Title made by lawe ; the other by a doubtfull Title wonne by the Sword.

France.

But leaue *Ireland* gotten by Conquest ; vwhat say you to the great kingdome of

France;

France ; which *Edward* the third had first in right by lawfull descent, and after in possession by triumphant Conquest ; and vwhich *Henry* the sixt held after in possession by descent ? Was euer doubt made, Whether the subiects borne there so long as it vwas in subiection and obedience to the King, vvere capable of landes in *England* ?

I vwill now turne the Case , and aske an other Question ; If King *James* our Soueraigne had first beene King of *England* by lawfull descent (as novv hee is) and after *Scotland* had descended vnto him, should not the Subiects of *Scotland* (I speake still of *Post-nati*) haue beene iudged as Naturall subiects in *England*, as those of *France* were in *Edward* the thirds time?

Then, he hauing now both kingdomes by lineall, true, and lawfull descent, it can make no difference touching the capacite of Subiects , vwhich kingdome descended to him first , and vwhich second ; but both are to him alike. And it is cleere,

*Normandy
and Aquitany.
Obiect. 2.*

Repons.

Post-nati in *England* are now capable and inheritable in *Scotland*, though some haue made a causelesse and needelesse doubt of it : and so on the other side those of *Scotland* are in *England*.

It is said, *Normandie* and *Aquitanie* were no monarchies or kingdomes, but dukedomes or seigniories in *France*, and holden of the Crowne of *France*, and therefore not to bee resembled to *Scotland*, which is an ancient and absolute kingdome.

This Obiection reacheth not to the reason of our Question : For, bee they kingdomes, bee they Seigniories, yet the subiectes borne there, were borne out of the kingdome of *England*, and so in that respect Aliens : But in that they were borne within the kings dominions, and vnder his subiection and obedience, they were no Aliens but liege and naturall borne subiectes to the King ; and so capable and inheritable in *England*.

I say besides, the Dukes of Normandie and Aquitany were absolute Princes, and had soueraigne power in those countries, although they did not beare the name of kings ; as at this time the Duke of Sauoy ; the duke of Florence ; the Duke and State of Venice ; and of late , the great Duke of Russia ; the Duke of Burgundy ; the Archduke of Austria, &c.

So the difference in Stile and Name makes no difference in Soueraignty : For, king Henry the eight had as absolute soueraignetie in Ireland , vwhen his Stile was Lord of Ireland , as when hee changed his Stile, and was called, King of Ireland.

And, to say , That the tenure of the Crowne of Fraunce should giue any priuilege to them of Normandie and Aquitanie in England is a strange conceipt ; It might rather bee objected against them. But, as I saied before , they were borne within the kings Dominions , and vnder his obeisance , and therefore as subiects borne in England.

And

And if men may beleue some auncient Stories, *Aquitany* and *Normandy* had sometimes kings, and were kingdoms of them-selues : and not depending nor subiect to the Crowne of *France*: and the kingdome of *France* was then a small portion of *Gal-lia*, and but a little one, in comparison of that which it is at this day. And some say, that there were foure and twentie kings in *Gaule*: But as the kings of *France* increased in povver and strength , they subdued their neighbor-Princes , and so that kingdome grew to that greatnesse that novv it is at; euен as the *Heptarchie* in *England* was dissoluied , and made an intire kingdome, when one of the kings mightier than the rest subdued his neighbors.

The Crowne
and great seale
of England.
Obiect. 3.

Reſponſ.

It is saied further, that *Normandy* and *Aquitany* vvere subiects to the Crowne of *England*; and to the great Seale of *England*; but lo is not *Scotland*: Ergo &c.

This standeth not wel with that which

was obiected before ; That they were but Seignories houlden of the Crowne of Fraunce. And it is true , that before Edward the thirds time , those Kings of England that held those great Seignories , did acknowledge , that they held the same of the Crowne of Fraunce .

But these Obiections be light , and not worth the time that hath beene spent about them . The Soueraignetie is in the person of the King ; the Crowne is but an Ensigne of Soueraignety ; the Inuesture and Coronation are but Ceremonies of honour , and maiestie : the King is an absolute and perfect king before he be crowned , and without those Ceremonies .

The Seale is to be altered and changed at the will and pleasure of the King : hee may haue one , hee may haue many , as pleafeth him . The King did vse Queene Elizabeths Seale , for diuerse moneths after his comming into England : Queene Elizabeth vſed king Philips & queene Marries Scale for a time ; and queene Marie v-

sed king Edward's seale. And all that vvas
so done, was well and lawfully done. Ma-
ny things were done by auncient kings of
England before the Conquest by their sig-
nature, and signe manuell without anie
seale at all; and some such since the Con-
quest also: as Graunts made by *Maude the*
Empresse to *Albericke de Vere*, and others.

The King may by his great seale com-
maund all his subiectes that bee vnder his
obedience wheresoeuer they bee in the
world: So he did in *Normandie*; so he did
in *Aquitany*; so hee did in that part of *Scot-*
land that he had in possession. And in 24.
Edw. I. his Judges kept ordinary Courts
of iustice there: and I haue seene the Re-
cords of *Placita Exercitus Regis apud Edin-*
burgh, Apud Roxburgh, Apud S. Johns-towne,
&c. in Scotia. So hee may commaund his
subiects, if they be in *France, Spaine, Rome,*
or Turkie, or the Indies. And for seuerall
seales, the Earle of *Chester* had a speciaill
seale for that his auncient County *Palatine*.
The Duke of *Lancaster* had a speciaill seale

for his new Countie *Palatine*. And after, when these Counties came to the kinges possession , the Kinges continued severall seales in them both for the administration of iustice ; but as subordinate to the great Seal of *England*.

And I make little doubt, but if the King shall now commaund any of his subiects of *Scotland* vnder his great seale of *England*, they will (as they ought) duetifullly obey him. As in king *Edward* the 1. *Edward* the 2. and *Edward* the 3. times they comman- ded many of the Lordes of that parte of *Scotland* which then was vnder their obe- dience.

I finde, that in 13. *Edw.* 2. quarto die Junij, the King Constituit Adomaru de Valentia co- mitem Pēbrochiae Custodem Regni sui; ac locum suum tenentē quamdiu Rex in partibus trans- marinis morā fecerit. And the next day, viz. Die Louis quinto die Junij Rex ordinauit, quod magnum Sigillum suum remaneret clausum in aliquo loco seculo , dum Rex esset in partibus

transmarinis : Et ordinavit quoddam aliud paruum Sigillum interim pro regimine Regni, ad brevia, &c. Consignanda, sub Teste Adomari de Valentia Comitis Pembroch. Nota, heere was a petty Seale pro regimine Regni, wherein are comprised Comissions for Iustice, Mandatoria, & ad brevia consignanda; which is for Remedialia as they are termed.

*Several Laws.
Obiect. 4.*

It is saide, that Scotland hath Lawes that are proper for that kingdome, & that they are not subiect to the lawes of England, and so è contra.

And lastly it was saide, that in England euery person was within the iurisdiction of some Leete, and at the age of twelue yeares euery one is to bee sworne in the Leete to bee Fojall and Lojall to the King of England ; That is, to the Lawes of England, (for so hee vnderstode Lojall:) But Postnati in Scotland can not be so; and that they haue an other forme of oathe in Scotland : Ergo, &c.

For

Reffons.

For this last parte, of the Oathe in the Leete, the Lord chiese Baron did cleere it to plainly, as more needes not to be said. This is *Legalis ligeantia*, It is not *Alta ligeantia* by birth, which is that which we haue now in question.

The Historicall discourse that hath bin made of Leetes, of Law-dayes, of *Decenna*, *Decennarij*, of the Tenne-mens Tale, and the Oathe of all Male children of twelue yeeres, &c. taken at the Leete, is no newes indeede, it is very olde.

Master *Lambard* hath it all, and more too, at large in *Explicatione verborum* in the word *Centuria*; It vvas before the Conquest.

But it maketh nothing to this naturall Allegiance and subiection of birth; it is not *Alta ligeantia* by birth-right; it is but *Legalis ligeantia* by Policie: And *Fitzherbert* calleth it *Swearing to the Lawe*.

And if that were the onely Bond and Marke of Allegiance, many are out of it, and so at libertie. As, children vnder

Lambard in explicatione verbi Centuria.

Marietta
twelue yeeres; yet sometimes they may commit treason and felony; where, *Malitia supplet statem*: So women of all sortes; yet they may bee shrewd and daungerous traitours; and if they bee women nobly borne, or widowes that were wiues to noblemen, they shall bee tried *per pares*.

” Also Noble men of all sortes, who are neither bound to attend the Leete, nor to take that Oathe, as appeereth by *Britton cap. 29.* treating of the Court called *The Shirifes Turne*, out of which the Leete seemeth to be extracted: For, whatsoeuer is not presented in the Leete may bee presented and punished in the *Shirifs Turne*. And M. Kitchin citeth *Britton* in this point for the Leete; and alleadegeth also the statute of *Marlebridge cap. 10.* to the same purpose.

And at this day the view of Francke-pleges, and the putting in of Francke-pleges, and the *Decennarij*, are but bare names of things past, the vse and substance is obsolete and gone.

And, as it was saide, few in this place haue put in such Pleges, or taken that Oath, and yet I trust wee are good subiects, and beare true faith and allegiance.

But this hath beene so fully answered and cleared by the Lord chiefe Baron, and the Lord Coke, chiefe Iustice of the Common pleas, as I doe wrong to spend time in it.

But touching the seuerall Lawes; I say, that seuerall lawes can make no difference in matter of Soueraigntie; and in the bond of Allegiance and obedience to one King: And so it concludeth nothing for the point in question.

Normandy and Aquitany had seuerall lawes differing from the lawes of England: so had Fraunce in King Edward the 3. and Henry the 6. his time.

Ireland, before king Johns time continued their auncient Lawes, and so, for the most part, haue done eversince. And
on Gernesey and Jersey haue yet at this day

seuerall lawes, which, for the most part, were the auncient Lawes and Customes of Normandie.

Wales had, & in many things yet haue seuerall Lawes : so for the County Palatine of Chester also.

Yet these neuer were, nor must not be cancelled and cut off from their allegiance and obedience to the King ; nor the Kings subiects borne there be incapable of lands and inheritaunce in *England* : for vwhere there is but one Soueraigne, all his subiects borne in all his Dominions bee borne *Ad fidem Regis* ; and are bound to him by one bond of Faith and Allegiance: And in that, one is not greater nor lesser than an other: nor one to bee preferred before another: but all to bee obedient alike ; and to be ruled alike ; yet vnder seuerall Lawes and Customes. And as Saint Gregorie sayeth of the Church, *In una fide nihil officit Ecclesia sancta diuersa consuetudo*. So I will conclude for this point, That diuersitie of Lawes and Customes makes no

breach of that vnitie of obedience , faith, and allegiance which all liege subiects owe to their liege King and Soueraigne Lord. And as none of them can be Aliens to the king , so none of them can bee Aliens or Strangers in any of his kingdomes or dominions ; nor Aliens or strangers one to another , no more than a Kentishman, to a Cheshire-man ; or *e contra.*

And therefore all that haue bin borne in any of the kinges dominions since hee was King of *England*, are capable and inheritable in all his Dominions without exception.

And as to the other parte of the Obiection , that there will be defect of triall ; for, things done in *Scotland* , cannot bee tried in *England* ; I say , that that maketh little to our present Question , whether *Post-nati* in *Scotland* , be Aliens in *England* , and not capable of landes in *England* : but it trencheth to cast some asperion vp- on the common lawe of *England* ; That

Defect of
Triall.

it is not sufficient to giue iustice to the Kinges subiectes for lacke of sufficient meanes of triall of questions of fact : but to this baron *Altham* gaue so full an aunsware , as more cannot bee saied : And so hee did both cleare the doubt , and did vphould the sufficiencie of the lawe of *England* in that behalfe . And it seemeth strange , that this should now bee found out to bee obiectet against *Scotland* , since it vvas neuer heeretofore obiectet for *France* , *Normandie* , *Aquitany* , nor is at this day for *Ireland* , *Gernesey* , and *Jersey* , &c . whereas all stand vpon the same reason for the point of triall . But the wisedome of the lawe of *England* hath beene such , as there neuer failed certen rules for triall of all questions in fact ; and those were fittet and adapted to the Matter which was to bee tried . And therefore , whosoeuer doth diligently obserue it , hee shall finde in the course and practise of the lawes of *England* aboue twenty seuerall formes of trialls : as by Battell ; by Iurie , and that

in diuerse kindes ; by Wager of Lawe ; by Prooffes ; by Examination ; by Inspection ; by Certificates of diuerse kindes ; and by manie other wayes : And lest there should bee any defect in that behalfe , the Law hath prouided seuerall formes of *Ioyning of issues* ; and in that , hath speciall regard of things done out of the Realme , as euerie Student may see in the Bookes of Reports.

Thus I haue passed these foure Obiections , and therefore for this part I conclude , That if *Argumentum à simili* were euer good and concludent in Lawe , my Lords the Judges haue proued this Case by so many plaine and direct Examples , and like Cases ; and by so manie strong arguments & solide reasons drawne out of Booke Cases , out of Statutes , out of the true rules and forme of pleading , and out of ancient Records and Precedents , some produced by M. Attorney , and many more remembred by the Judges , as no

one thing can bee more plainly exemplified, nor appeare more like to an other, than this Case is to those Cases which they haue remembred.

Recurrere ad Rationem.

But if examples and arguments à simili doe faile, then it remaineth *Recurrere ad Rationem*; and what reason that ought to bee, and how to bee ynderstoode, is to be considered: for, it is said, that *Lex est ratio summa, iubens ea quæ facienda sunt, & prohibens contraria*. So it must be the depth of reason, not the light and shallow dis tempered reasons of common Discou sers walking in Powles, or at Ordinaries, in their feasting and drinking, drowned with drincke, or blowne away with a whiffe of Tobacco. *Lucretius* noteth, that in many there is *Rationis egestas*: And saint *Gregory* saith, *Qui in factis Dei rationem non videt, infirmitatem suam considerans cur non videat, rationem videt*: For, although Reason and Knowledge bee infinite, yet no man can haue more of it than hee is capable of: Euery man must receiue it, and keepe it

in his owne vessell ; he cannot borrow his neighbours braine-pan to put it in. And therefore it is not without cause , that one of the grauest and best learned Lawyers of our age , and a priuie Counsellor to one of the greatest Monarchs of *Europe* , describeth those that should bee Interpreters of Lawes by foure speciall qualities , That is , 1. *AEtate graues* , 2. *Eruditione præstantes* , 3. *Vsu rerum prudentes* , 4. *Publica authoritate constituti*: So, there must be grauitie, there must be learning , there must be experience , and there must be authoritie : and if any one of these want , they are not to be allowed to be Interpreters of the Lawe.

How all these Qualities concurre in these reuerend Judges , whom wee haue heard in this present Case , I wil spare to speake vwhat I thinke : For , *Chrysostome* teacheth mee , *Qui laudatur in facie, flagellatur in corde.*

In seeking out this depth of Reason ,

Hopperus de
vera Iuri pru-
dentia pag. 118

Hopperus ibid.
pag. 119.

the same Author giueth a caution , which
is this ; *Vitium quod in hoc genere fugi debet
est, ne, si Ratione non imuenias, mox legem sine
ratione esse clamet.* And in 36.H.6.Fortescue
saith the same in effect , which is thus ;
*We haue many Courses and Formes which bee
houlden for Lawe, and haue beeene houlden and
vsed because of Reason ; and notwithstanding
the reason be not ready in memory, yet by study
and labour a man may finde it.*

Now when wee come to examine by
reason , whether Post-nati in Scotland shall
be disabled as Aliens , or shall be capable
of lands in England , as naturall borne sub-
iects there ; wee are first to consider vwhat
is the reason whic Aliens in the Domini-
ons , and vnder the obedience of other
forraine Princes , are nor capable of landes
in England : And surely, the true reason is,
that which was noted by baron Altham ;
and hath since beeene ofte remembred, viz.
The danger that might thereby come to
the king and the common-weale : Special-

ly by drawing hither too great multitudes of them : for so the Treasure of the Realme might bee transported by them into other forraine Kingdomes and Countries ; whereby it might bee vsed against the King , and to the prejudicē of the State . And besides , they might vnder-hand practise Sedition and Rebellion in the kingdome , and cause many other daun-gers and inconueniences : but that rea-son cannot serue against *Post-nati* in Scot-land , now that there is but one King of both the kingdomes , no more than it can serue against those that are borne in *Ire-land* , or *Gernesey* , or *Jersey* : and therefore in reason they are as capable of landes in *England* , as the kings subiects of *Ireland* , and *Gernesey* , and *Jersey* are .

Against this , there haue also beeene ma-ny Obiections made , and Reasons deuised that seeme witty , and haue some shew of probability to proue that *Post-nati* in Scot-land are Aliens , and ought not in reason

Obiections.

to

to bee capable of landes in *England*, videlicet:

1. That *England* and *Scotland* were two ancient seuerall kingdomes vnder seuerall kings, and seuerall crownes.

2. That they continue yet seueral kingdomes.

3. That they haue yet seuerall Lawes, seuerall Seales, seuerall Crownes, and seuerall Kings: For, it is said, though king *James* be king of both, and hath but one naturall body, yet in iudgement of Law, he is in respect of his two seuerall kingdomes, as two seuerall kings, and the subiects of ech seuerall kingdom are bound to him by distinct allegiance, according to the seuerall Lawes of the kingdom where they were borne.

And all this is grounded vpon this rule or fiction in Lawe: *Quando duo iura concurrunt in una persona, equum est ac si essent in diuersis.*

And vpon this ground is this new form of pleading deuised, which the Defen-

dants haue vsed in this Case , such as can-
not be found in any Record , euer to haue
beene pleaded before ; and may as well
serue against the Kinges subiectes of Ire-
land , as against the Post-nati of Scotland .
And sithence in former times the like
forme of pleading vvas never seene a-
gainst any of the Kings of Englandes sub-
iects , which were borne in any of his do-
minions out of England , as in Normandie or
Aquitaine , or in France (I meane such part
of it as was in the Kinges possession , and
in subiecture and obedience to him , and
not in that parte of France which his ene-
mies helde) it may be probably inferred ,
That it was then generally houlden , that
neither such a forme of pleading , nor the
Matter it selfe was sufficient in Lawe to
disable anie such Plaintiffe : for , against
French-men that vvere not vnder the
Kings obedience wee finde it often plea-
ded . And as those that were not subiects
to the King , nor borne vnder his obedi-
ence , did then presume to bring suites ,

and actions in *England*. So it can not bee thought, but that the king hauing then so large and ample Dominions beyond the Seas, as *Normandy* and *Aquitany*, and many other partes of *France*, some of his subiects borne there, had cause to haue, and did bring the like suites in *England*. And sithence no such Plea is found to haue beene then vsed against them, it can not in Lawe and Reason bee now allowed against the *Post-nati* in *Scotland*: For, I may say as *Ascue* saied in 37. H.6. Our Predeces-
sors were as sage and learned as we be.

And I see not, but that in this Case a good Argument may bee reasonably deduced from the Negatiue, as it was in the Case reported by the great learned, and most graue and reuerend Judge sir *James Dyer* chiefe Justice of the Common pleas, Anno 23. Elizab. The Question there, was, Whether an erroneous judgement giuen in *Rie*, which is a member of the Cinque-
portes, might bee reuersed in the kinges Bench, or Common place at Westmin-

P. 23. Elizab.
Dyer. 376.

ster;

ster; And it was thus resolued; Sed pro eo quod nullū tale breue in Registro, nec in aliquibus Precedentibus curiarum prædictarū inueniri potuerat, dominus Cancellarius Bromley per opinionem Capitalium Iusticiariorum utriusque Banci denegauit tale breue concedere. And so Iustice Fenners argument houldeth well, viz. There is in this Case no lawe to exclude the Complainant, Ergo hee is a liege and a naturall borne subiect.

But the forme of pleading in the time of king Ed.i. in Cobledickes case, which was cited out of *Hengam*, (and the Booke shewed heere by the Lord chiefe Iustice Coke) is so direct and plaine for this our Question, as nothing can be more plaine and therefore I thinke it not amisse to report it againe.

That Case was in effect and substaunce, thus:

A woman brought a Writte of *Ayel* against *Roger Cobledicke*, and declared of the seisin of *Roger* her Grand-father, and conueied the dissent to *Gilbert* her father;

and from him to the Demaundant, as his daughter and heire. The Tenant pleaded, that the Demaundant was a French-woman, and not of the liegence nor of the fidelitie of *England*; and demaunded iudgement if shee ought to haue the action against him. This plea vvas houlden to bee insufficient; and thereupon the tenant amended his plea, and pleaded further, That the Demaundant was not of the liegence of *England*, nor of the fidelitie of the King; and deniaunded iudgement, &c. And against that plea none exception was taken, but thereupon the Demaundant prayed licence to departt from her Writ. By this it appeareth plainly, that the first plea, alleadging that she was a French-woman, and not of the liegence, nor of the fidelitie of *England*, was insufficient (and so declared by Berreford the chiese Iustice;) For, there can bee no fidelitie nor allegiance due to *England*, respecting the land and soile without a Soueraigne and King. But the second Plea

alledging,

alleging, that shee was not of the ligeance of *England*, nor of the fidelitie of the King, was good and sufficient: For, to the King fidelitie and allegiance is due; and therefore, since shee failed in that, she was not to be answered: and thereupon she praied licence to departe from her Writte, and so she left her suite.

Now, for the reasons which haue beeene drawne and strained out of the statute *An. 14. Edw. 3.* if they bee well examined, they serue little for this point which we haue in hand.

It is to be considered, at what time, and vpon what occasion that Statute was made: King *Edw.* the third being right heire to the Crowne and Kingdome of *Fraunce* by descent from his Mother, and hauing spent many yeeres for the recouering of the same, resolued to take vpon him the Name and Stile of *King of France*; being aduised thereunto by them of *Flaunders*: Hereupon he did take the Stile of *King of*

*Stat. 14. Ed. 3.
That the
Realme of
England shall
not be subiect
to France.*

France; and altered his Seale and his Armes; and after a while, placed the Armes of *France* before the ancient Armes of *England*, as they are borne at this day. This gaue occasion for the making of this statute: for some people (*Ascungentes*, saith the statute) seeing this change, and considering the large and ample extent, and the magnificence of that great Kingdome, beganne to doubt that the king would make his Imperiall seate there; and conceiued thereby, that the kingdome of *England*, being the lesser, should bee in subiection of the king and kingdome of *France*, being the greater, and to bee gouerned and ruled by a Vice-Roy, or Deputy, as they saw *Ireland* was. And though in the Kings Stile, *England* was placed before *France*, yet they sawe the Armes of *France* marshalled before the Armes of *England*; though at the first bearing thereof some say it was not so.

To cleere this doubt, and to take away this feare from the Subiects of *England*,

was this Statute made, as doth plainly appeare by the wordes of the statute it selfe.

Now if you will make an apt and proper application of that Case then betweene *England* and *Fraunce*, to this our Case now, betweene *Scotland* and *England*, it must be thus:

1. *Edw. 3.* then king of *England* (being the lesser) had afterwardes the kingdome of *France* (being the greater) by descent, and tooke the Stile of *King of France*.

King *James* king of *Scotland* (beeing the lesser) hath afterward the kingdome of *England* (being the greater) by descent, and taketh the Stile of *King of England*.

2. King *Ed. 3.* altered his Seale, and his Armes, and placed the Armes of *Fraunce* before the Armes of *England*.

King *James* hath changed his Seale, and his Armes in *England*, and hath placed the

Armes of *England* before the Armes of
Scotland.

3. It was then doubted, that King *Edw.*
3. would remoue his Court out of *England*,
the lesser, and keepe his Imperiall seate and
state in *France*, the greater.

King *James* hath indeede remooued his
Court out of *Scotland*, the lesser, and doth
in his royall person (with the Queene and
Prince, and all his Children) keepe his Im-
periall seate in *England*, the greater.

4. In al these the cases agree; but yet one
difference there is, and that is in the Stile :
For king Ed. 3. in his Stile placed *England*,
the lesler, being his ancient kingdome, be-
fore *France*, the greater, being newly de-
scended vnto him.

But King *James* in his Stile placeth *Eng-*
land, the greater, though newly descended
vnto him, before *Scotland*, the lesser, being
his ancient kingdome.

5. Now

5. Now, this being thus ; perhapses *Scotland* might out of this Example haue conceiued the like doubt against *England*, as *England* did then against *France*: But as there was then no doubt made, whether the kings subiects borne in *England* should be capable of lands in *France*; so, out of this statute, and vpon this example no doubt can bee inferred , whether the kings subiects now borne in *Scotland*, shall be capable of lands in *England*.

But, all these Obiections , and the ground whereupon they are framed, *viz.* *Quando duo iura &c.* haue beene so thorowly and profoundly examined , and so learnedly and fully answered and clee red by the Judges, as I make no doubt but all wise and indifferent hearers be well satisfied therein.

And if there bee any so possessed with a preiudicte opinion against Trueth, and Reason, that will say in their owne heartes *licet persuaseris non persuadebis* ; & so, either Serpent-like stop their eares, or else wil-

fully absent themselues, because they would not heare the weaknesse and absurdities of their owne conceipts laied open and confuted : If there bee any such I say (as I trust there bee but few, and yet I feare there bee some) I would they had learned of *Tertullian*, That *Veritas docendo suadet, non suadendo docet*. And I wish that they bee not found among the number of those to whome Saint *Paul* saith, *Si quis ignorat, ignoret*: And Saint *John* in the Apocalips, *Qui sordidus est, fordescat adhuc*. And I will exhort with Saint *Paul*. *Qui tenet, tenet*, and not wauer or doubt by such weake arguments and obiections.

A dangerous distinction be-
tweene the
King and the
Crownes,

But in this new learning, there is one part of it so strange, and of so daungerous consequent, as I may not let it passe, viz. That the king is as a king diuided in himselfe ; and so as two kings of two severall kingdomes ; and that there be severall allegances, and severall subiections due vnto him respectiuely in regarde of his seve-

rall

rall kingdomes , the one not participating with the other.

This is a daungerous distinction betweene the King and the Crowne, and betweene the King and the kingdome; It reaccheth too farre ; I wish euery good subiect to beware of it. It was neuer taught , but either by traitours, as in *Spencers Bill* in Edward the seconds time (which Baron Snig, and the Lord chiefe Baron, and Lord Coke remembred) or by treasonable Papists, as *Harding* in his Confutation of the Apologie maintaineth, that Kings haue their authority by the positiuе Lawe of Nations, and haue no more power, than the People hath , of whome they take their temporall iurisdiction ; and so *Ficlerus Simanca*, and others of that crew.

Or by seditious Sectaries and Puritans, as *Buchannon De Iure Regni apud Scotos*, *Penry*, *Knox*, and such like.

For , by these , and those that are their followers, and of their Faction , there is in

their Pamphlets too much such traitorous
seede sowne.

Absurdities in
this dange-
rous distincⁿō

But leauing this , I will adde a little more, to prooue, that in reason *Robert Caluine*, and other-like *Post-nati* in Scotland, ought by Lawe to be capable of landes in *England*: and for that, I wil remember one rule more which is certen and faileth not, and ought to bee obserued in all Interpretation of Lawes ; and that is, *Ne quid absurdum, ne quid illusorium admittatur.*

But , vpon this subtile and dangerous Distinction of Faith and Allegiance due to the King , and of Faith and Allegiance due to the Crowne , and to the Kingdome (which is the onely Basis and fundamentall maine reason to disable the Plaintiff, and all *Post-nati*) there follow too many grosse , and fowle absurdities , whereof I will touch some few, and so conclude, that in Lawe and Reason this subtile, but absurd and dangerous distinction , ought not to be allowed.

This

This Bond of Allegiance whereof wee dispute, is *Vinculum fidei*; it bindeth the soule and conscience of euery subiect severally and respectiuely, to be faithfull and obedient to the King: and as a Soule or Conscience cannot bee framed by Policie; so Faith and Allegiance cannot bee framed by Policie, nor put into a politike bodie. An oath must be sworne by a naturall bodie; homage and fealtie must be done by a naturall bodie, a politike body cannot doe it.

Now then, since there is but one king, and soueraigne, to whome this faith and allegiance is due by all his subiects of *England* and *Scotland*, can any humane policie diuide this one King, and make him two kings? Can *cor Regis Angliae* be in *manu Domini*, and *cor Regis Scotiae* not so? Can there bee warres betweene the King of *England*, and the king of *Scotland*? or betweene the kingdome of *England*, and the kingdome of *Scotland*, so long as there is but one king? Can the king of *England* now send

an army roial into Scotland against the king of Scotland? Can there bee any Letters of Marke or Reprisall now graunted by the king of England, against the subiects of the king of Scotland? Can there bee any Protections now, *Quia profecturus in exercitu Iacobii Regis Anglie in Scotiam?*

Nay shortly, Can any man bee a true subiect to King James as King of England, and a traitor or rebell to king James as king of Scotland? Shall a foote breadth, or an inch breadth of ground make a difference of birth-right of subiects borne vnder one king? Nay, where there are not any certen bounds or limites knowne at all, but an imaginarie partition wall, by a conceipted fiction in Lawe? It is enough to propound these and such like Questions, whereof many more might be remembred: they carry a sufficient and plaine answeare in themselues: *Magis docet qui prudenter interrogat.*

As the King nor his heart cannot bee

diuided, for hee is one entire King ouer all his subiectes, in which soever of his Kingdomes or Dominions they vvere borne, so hee must not bee serued nor obeyed by halues ; hee must haue intire and perfect obedience of his subiects: for, *Ligentia* (as Baron Heron saied well) must haue foure qualities ; It must bee 1. *Pura & simplex*: 2. *Integra & solida*: 3. *Vniuersalis non localis*: 4. *Permanens, continua, & illesa*. Diuide a mans heart, and you lose both parts of it, and make no heart at all; so hee that is not an intire subiect, but halfe faced, is no subiect at all; and hee that is borne an intire and perfect subiect, ought by Reason and Lawe to haue all the freedomes, priuiledges, and Benefites pertaining to his Birth-right in all the Kinges Dominions ; and such are all the Post-nati in England and Scotland. And the inconuenience of this imaginary locall allegiance hath beene so lately, and so fully declared by the Lorde chiefe Justice Coke, as more needes not bee saied in it.

In some speciall Cases there sometime may bee a king of subiects without land in possession, as Iustice *Fenner* noted in the gouernement which *Moses* had ouer the people of *Israel* in the wildernes; and as in the Case which sir *John Popham* the late Lord chiefe Iustice did put in the Parliament : If a King and his subiects bee druen out of his kingdome by his enemies, yet notwithstanding hee continueth still King ouer those subiects, and they are still bound vnto him by their bond of allegiance, whereloeuer hee and they bee : But there can not bee a King of land without subiects : For, that were but *Imperium in bellis*, and, *Rex & subditis sunt relativa*.

Rex solus indu-
cet &c.

I saied there was an other generall rule for expounding of Lawes, which I reserved to bee last spoken of, I will now but touch it ; for, I will nor stand to examine by humane reasons, whether Kings were before Lawes, or Lawes before Kinges ; nor how Kings were first ordained ; nor

whe-

whether the kings, or the people did first make Lawes ; nor the seuerall constitutions and frames of states and commonweales ; nor what *Plato* or *Aristotle* haue written of this argmment.

They were men of singuler learning and wisedome, but wee must consider the time, and the countrie in which they liued, and in all their great learning they lacked the true learning of the knowledge of God. They were borne and liued in *Greece*, and in popular States : they were enemies, or atleast mislikers of all Monarchies ; yet one of them disdained not to bee a seruant or mercenarie hireling to a Monarch. They accompted all the world barbarous, but their owne Countrey of *Greece* : their opinions therefore are no Cannons to giue Lawes to kinges and kingdomes , no more than sir *Thomas Moores Utopia*, or such Pamphlets as wee haue at euerie Marte.

I beleue him that saith, *Per me Reges regnant, & Principes iusta decernant*; And

Prou.ca.8.

I make no doubt, but that as God ordaine
ned kings, and hath giuen Lawes to kings
themselves, so hee hath authorized and
giuen power to Kings to giue Lawes to
their subiects ; and so kings did first make
lawes, and then ruled by their lawes, and
altered and changed their Lawes from
time to time , as they sawe occasion , for
the good of themselues , and their sub-
iects.

¶ And this power they haue from God
almighty ; For, as Saint Augustine saith, *In
hoc Reges Deo seruiunt sicut eis Diuinitus præ-
cipitum, in quantum sunt Reges, si in suo Regno
bona iubent, mala prohibent, non solum que
pertinent ad humanam societatem, verum etiam
que ad diuinam religionem.*

¶ And I hould Thomas Aquinas his opini-
on to be good , *Rex solitus à Legibus quoad
vim coactiuam, subditus est legibus quoad vim di-
rectiuam propria voluntate.* And for this o-
pinion there is a stronger authoritie, euuen
from God himselfe in Ecclesiastes, ca. 8. ver.
2. *Ego os Regis obseruo; Et præcepta iuramenti*

*Dei, & ver. 4. Sermo illius potestate plenus est:
Nec dicere ei quisquam potest, quare ita facis?*

Now beeing led a little from the Common Lawe to the Ciuile Lawe, I finde in the ciuile Lawe a direct Text, warranting that generall Rule which I referued to this place, which is this ; *Inter aequitatem iusque interpositam interpretationem nobis solis & licet & oportet inspicere.*

And another like Text in these words, *Sententia Principis Ius dubium declarans, Ius facit quod ad omnes.* And some graue and notable Writers in the ciuile Lawe say, *Rex est lex animata :* Some say, *Rex est lex loquens :* Some others say, *Interpretantur legem consuetudo & Princeps :* Another saith, *Rex solus iudicat de causa à iure non definita.*

*Cod.i.i. Tit.14
lo. I.*

Ibidem le. 12.

And as I may not forget Saint Augu-
stines words , which are these ; *Generale pa-
ctum est societatis humanæ regibus suis obtempe-
rare.* So I may not wrong the Judges of the
common Lawe of England so much as to

suffer an imputation to bee cast vpon them, That they , or the Common lawe doe not attribute as great power and authoritie to their Soueraignes the kinges of *England*, as the Romane lawes did to their Emperours: For, *Braetton* the chiefe Iustice in the time of king *Henry the third*, hath these direct wordes, *De Chartis Regijs & factis regum non debent nec possunt Iusticiarij nec priuatae personae disputare. Nec etiam, si in illa dubitatio oriatur, possunt eam interpretari. Et in dubijs & obscuris, vel si aliqua dictio duos contineat intellectus, domini Regis erit expectanda interpretatio & voluntas; Cum eius sit interpretari cuius est condere.* And *Britton* in the time of king *Ed. I.* writeth as much in effect,

So as now if this question seem difficult, that neither direct law ; nor Examples & Precedents, nor application of like cases, nor discourse of reason, nor the graue opinion of the learned and reverend Judges, can resolve it , here is a true and certain Rule, how both by the Ciuile Lawe,

and

and the ancient Common lawe of *England* it may and ought to be decided: That is, by sentence of the most religious, learned, and iudicious king that euer this kingdome or Iland had.

But this Case is so cleare as this needeth not at all.

And in this I would not be mis-vnderstoode, as though I spake of making of new Lawes, or of altering the Lawes now standing; I meane not so, but I speake only of interpretation of the Lawe in new questions and doubts, as now in this present case: neither doe I meane hereby to derogate anything from the high court of Parliament; (farre be it from my thought) It is the great Councell of the kingdome, wherein euery subiect hath interest. And to speake of the constitution or forme of it, or how, or when it was first begunne, is for busie Questionists; It ought to bee obeyed and reuerenced, but not disputed; and it is at this time impertinent to this Question.

But certen it is, it hath beene the wisedome of the Kinges of this Realme to reserue in themselues that supremanie power to call their Nobles, Clergie, & commons together, when they sawe great and vrgent Causes ; and by that great Councell to make Edicts and Statutes for the weale of their people, and safetie of the Kingdome and State, as in *Anno 10. Edw. 3.* the Assembly at *Nottingham* for the great wars in *France* : And in *Anno 20. H. 3. Promises Merton*, which I remembred before.

Obiect. of
Inconuenien-
cie and fruga-
litie.

There haue beene made some Obiections of inconuenience, as for bearing of Scot and Lot, and such other charges; and some out of frugalitie, that the king shall lose his profit of making Denizens, and such like : These are so light as I leaue them to the winde ; They are neither fit for Parliament, nor Councell, nor Court.

Obiect. vpon
diffidence.

Another argument and reason against the Post-nati hath beene lately made out

of diffidence and mistrust , that they will come into *England* sans number , and so as it were to surcharge our Common-land that this may be in *secula seculorum*. I know not well what this meanes . The Nation is ancient , noble and famous ; they haue many honourable and woorthie Noble men and Gentlemen , and many wise and woorthie men of all degrees and qualities ; they haue lands and faire possessions in *Scotland* : Is it therefore to bee supposed , or can it in reason bee imagined , that such multitude sans number will leauue their native soile , and all transport themselues hither ? Hath the Irish done so ? Or those of *Wales* , or of the Isles of *Man* , *Gernesey* , and *Jersey* ? Whie should we then suspect it now more for *Scotland* ?

Nay , doe you suppose that the Kinge of *England* will euer suffer so great a parte of his Dominions , and so great and famous a Kingdome as *Scotland* is to be dis-peopled ? It is a doubt imagined without any foundation or ground of reason .

But

But if it were to bee doubted, the twelue Judges that haue concurred in opinion, and that late worthy Judge *Popham* had as great cause to feare it as any others: They are wise, they are learned, they haue faire possessions and good estates, They haue posteritie to care for, as others haue.

Yet, admit it bee a matter worth the doubting of, what is that to the yoong *Post-nati* that are not like in many yeares to come hither in such number? Shall we vpon this causlesse feare deprive them of their lawfull Birth-right?

Haue wee scene in these fие yeeres past anie moe of them than this one alone that haue gotten any Lands in *England*? And this little that he hath is so small and poore a portion, that his purchase is not great, and therefore no iust cause of offence to any.

Ante-nati.

Nay, if you looke vpon the *Ante-nati*, you shall find no such confluence hither, but some few (and very few in respect

of that great and populous kingdome) that haue done long and worthie seruice to his Maiestie, haue, and still doe attend him, which I trust no man mislikes. For, there can bee none so simple, or childish (if they haue but common sense) as to thinke that his Maesty should haue come hither alone amongst vs, and haue left behinde him in *Scotland*, and as it were caste off, all his ould and worthie Seruants.

And if these Noble and worthie Gentlemen of *Scotland*, I meane the *Ante-nati* be louingly and brotherly entertained amongst vs, with mutuall loue & beneuolence, that so we may *coalescere*, & be vniited together, by marriage, and otherwise (as in some particular cases wee see it already happily begunne) no doubt God will blesse this Vnion of both these Nations, and make them, and the King, and great *Britaine* to be famous through the world; and feared & redoubted of our enemies, and of all that wish vs ill : For, *Vix unita*

aciu:

Q

fortior,

Post-nati.

fortior, & concordia multos facit vnum. But what may follow vpon such arguments of diffidence and suspition, which seeme but to hinder Vnion, and to breedē discord and dissention I will not speake; Let euery wise man consider it well: For, *Hu-
mana consilia castigantur ubi cœlestibus se præfe-
runt.* And remember Saint Paules caution,
*Si inuicem mordetis, videte ne ab inuicem consu-
mamini.*

And for the resemblance that hath bin made of this Case of *Post-nati* (but indeed for the Vnion of both Kingdomes) with the houswifes cutting of her cloth by a threedē, I will say but this, That if shee cut her peece of cloth in length aswell as in breadth, all the threeds will bee cutte, and the cloth marred. And this cutting in this our Case, is, to cutte all aswell in length as in breadth, euен through all the Kinges Dominions; and so will rent asunder the whole frame of the V-

nion;

nion ; and cut in peeces all the thredds of Allegiance.

But now I wil aske this question: How long shall this suspition and doubt continue? Shall there bee a dis-vnion for euer? If it bee saied, No, but vntill the Lawes, and Customes of both Kingdomes bee made one and the same: then I aske; how, and when shall that be done? And it may bee, that the Constitutions of the Countries bee such as there can hardly in all things bee such an absolute and perfect reconciling or vniting of Lawes as is fancied. Is it yet so betweene *England* and *VValcs*? or betweene *Kent* and *Cornewall*? or betweene many other parts of this Kingdome? I say no ; and I speake it confidently, and truely it is not so , nor well can be so . Therefore let *England* and *Scotland* be in like degree now , as *England* and *VValcs* were for many hundred yeeres , and in many things are yet still ; and yet let Vnion and Loue increase amongst vs,

A Question,
how long this
suspition and
dis-vnion shall
continue?

Bernard.

euē in secula seculorum. Let vs not be such as Saint Bernard noteth , *Amant quod non decet , timent quod non oportet , dolent vane , gaudent vanius .* And let vs no longer make question , whether seuerall Lawes and Customes bee markes of seperation and dis-vnion, or of seuerall Allegances; for certainlye they are not.

Obiection vp-
on Diuination

One other Reason remaines against these *Post-nati*, and that is out of a prouident foresight , or as it were a prophesying : What if a seperation of these Kingdomes fall hereafter ?

Repons.

Of this I can say but *Absit omen.* It is *Potentia remota* (as Justice *W*illiams saied) and I trust in God *Remotissima* : And I will euer pray to God that it neuer fall so , vntill the King of all Kinges resume all Scepters and Kingdomes into his owne hands. And let vs take heede of sinnes of Ingratitude and Disobedience; and remember, that *Adam and Eue were punished , Non*

propter pomum, sed propter vetitum. And for such Prophets, let the Prophet *Ezechiel* ca. 13. answer them, *Vae Prophætis insipientibus qui sequuntur spiritum suum, & nihil vident.* And the Prophet *Esay* speaketh to all such with an other *Vae, Vae illis qui dispersunt.*

Now then, as M. Solicitor beganne with seeking out the truth; so I will conclude with *Esdras* words, *Magna est Veritas & præualet:* And with this further, *Eatenus rationandum donec veritas inueniatur: Cùm inuenta est veritas, figendum ibi Iudicium: Et in victoria veritatis, soli veritatis inimici pereunt.*

The Conclusion.

THus I haue heere deliuered my concurrence in opinion with my Lordes the Judges, and the reasons that induce and satisfie my conscience, That Ro. Calvine, and all the Post-nati in Scotland, are in Reason, and by the Common Lawe of

England naturall borne subiects within the allegiance of the King of *England*; and inhabited to purchase and haue free-hould and inheritance of lands in *England*; and to bring reall actions for the same in *England*.

For , if they haue not this benefit by this blessed and happie Vnion , then are they in no better case in *England*, than the king of Spaines subiects borne in Spaine, &c. And so by this Vnion they haue gotten nothing : What they haue lost Iustice Yelverton did well note.

And therefore I must giue Iudgement in the Chancerie , That the Defendants there ought to make direct answer to Ro. Calunes Bill for the Lands and Evidences for which he complaines.

T. Ellesmere Canc.

